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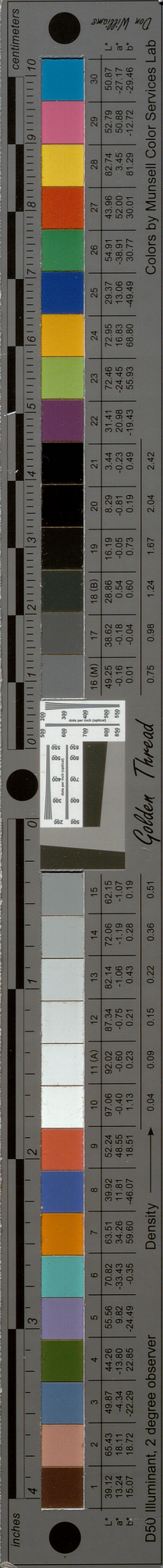
Library Company

vs.

WILLIAMS.

MASTER'S REPORT.

22583.0.4





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WILSON & SONS

STAMPA

1893



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# In the Supreme Court of Pennsylvania in and for the Eastern District.

THE LIBRARY COMPANY OF  
PHILADELPHIA,

vs.

HENRY J. WILLIAMS.

No. 1. July Term, 1871.  
In Equity.

And now, June 22d, 1872, on motion of Messrs. Rawle and  
McMurtrie, for Complainants, the Court appoint P. Pemberton  
Morris, Esquire, as Master in the above case, to report the law,  
the facts, and a decree proper to be made therein.

*Per Cur.*

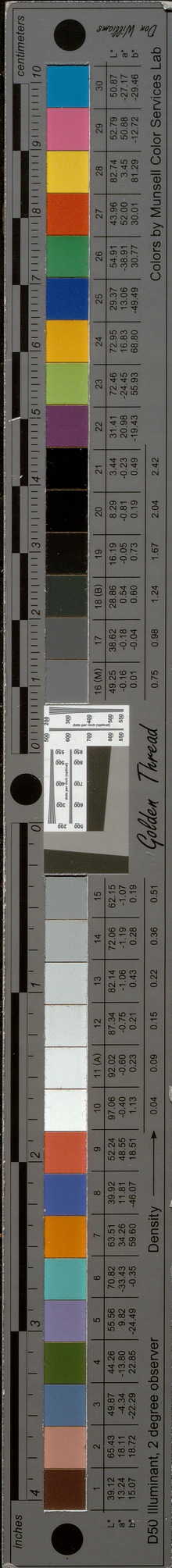
[From the Record.]

In testimony whereof I have hereunto set my hand, and affixed  
the seal of said Court, at Philadelphia, this twenty-fourth  
day of June, A. D. 1872.

JAMES ROSS SNOWDEN, [L. S.]

*Prothonotary.*

The Master, who is directed by his certificate of appoint-  
ment "to report the facts, the law, and a decree proper to be  
made," makes the following report: He was attended on the  
day appointed, June 25, 1872, by Wm. H. Rawle, Esq., and  
R. C. McMurtrie, Esq., for Plaintiffs, and by J. G. Johnson, Esq.,  
and George Junkin, Esq., for Defendant. The questions in-  
volved were elaborately discussed on that day, and at adjourned  
meetings on June 28, July 1, 2, 3, and 5, on the pleadings,  
Examiner's Report and Exhibits. The facts following are  
either proved or admitted.





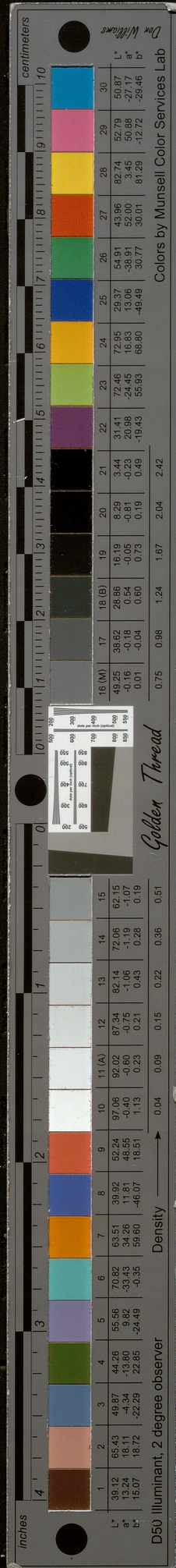
The Philadelphia Library Company was chartered on the 25th day of March, 1742, in the words following:

#### CHARTER OF THE LIBRARY COMPANY.

John Penn, Thomas Penn, and Richard Penn, Esquires, true and absolute proprietaries of the province of Pennsylvania, and counties of Newcastle, Kent, and Sussex, upon Delaware: To all to whom these presents shall come, greeting:

WHEREAS, Benjamin Franklin, Robert Grace, Anthony Nicholas, Thomas Cadwalader, William Coleman, Thomas Godfrey, Henry Pratt, Benjamin Paschall, Joseph Breintnall, John Jones, Jr., Samuel Hale, William Parsons, Nicholas Cassel, Francis Richardson, William Maugridge, David Bush, Thomas Hopkinson, Philip Syng, Jacob Duché, Evan Morgan, Joseph Stretch, John Paschall, Nicholas Scull, Thomas Green, Hugh Roberts, Rees Lloyd, John Roberts, Richard Standley, John Nicholas, John Sober, Charles Read, Daniel Harrison, James Morris, Thomas Shaw, John Read, Joshua Richey, James Hamilton, William Plumsted, John Bard, Samuel Morris, John Stamper, Samuel Norris, John Mifflin, John Langdale, Samuel Coates, Samuel Rhoads, Joseph King, Alexander Graydon, James Merrywether, Anthony Morris, Jr., Tobias Griscom, Charles Willing, Isaac Williams, William Allen, Joseph Peters, Richard Peters, Thomas Clay, Phineas Bond, Israel Pemberton, Jr., Robert Greenway, William Crosthwaite, William Callender, George Emlen, Jr., Isaiah Warner, Tench Francis, James Bingham, Charles Meredith, Samuel McCall, Hugh Davis, Amos Strettell, Benjamin Shoemaker, Joseph Hatton, Andrew Hamilton, Thomas Bond, and William Peters, have, at a great expense, purchased a large and valuable collection of useful books, in order to erect a library for the advancement of knowledge and literature in the City of Philadelphia; Now know ye, that we being truly sensible of the advantage that may accrue to the people of this Province by so useful an undertaking, and being willing to encourage the same, have given





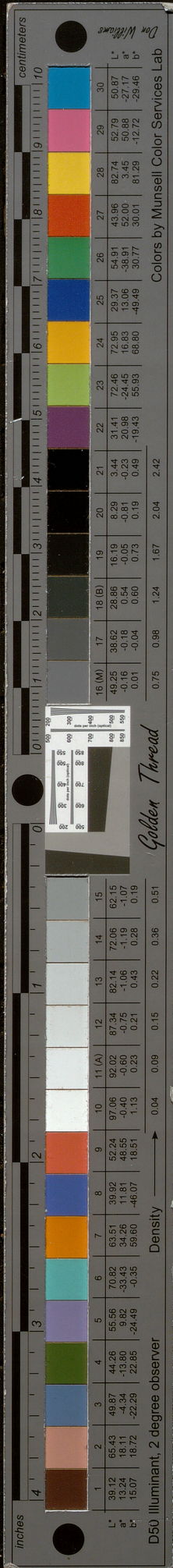


have, hold, receive, and enjoy lands, tenements, rents, liberties, franchises, and hereditaments, in fee simple or for term of life, lives, years, or otherwise; and also goods, chattels, and other things of what nature, kind or quality soever. And also to give, grant, let, sell, or assign the same lands, tenements, hereditaments, goods, and chattels; and to do and execute all other things about the same, by the name aforesaid; and also, that they and their successors, by the name of *The Library Company of Philadelphia*, be and shall be forever hereafter persons able and capable in law to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in all and any of the courts or other places, and before any judges, justices, and other persons whatsoever, in all manner of actions, suits, complaints, pleas, causes, and matters whatsoever, and of what nature and kind soever. And that it shall and may be lawful to and for the said *Library Company of Philadelphia*, and their successors forever hereafter, to have one common seal for their use in their affairs; and the same at their will to change and alter. And for the well-ordering and governing the affairs of the said Company we do, for us, our heirs, and successors, further grant, That it shall and may be lawful for the said Company and their successors to assemble and meet together on the first Monday in May, in every year, and at such other times as there shall be occasion, at their Library, or some other convenient place, due and public notice being given at least twenty days before the times of such meetings; not only of the day, hour and place of such meeting, but of the cause thereof, and of the matters to be transacted at such meeting. And that they, the said Company, or one-fourth part of them at least, being so met in person, or by proxy duly constituted in writing, shall have full power and authority, from time to time, to make, constitute, and establish such laws, statutes, orders, and constitutions as shall appear to them, or the major part of them, to be good and useful, honest and necessary, according to the best of their judgment and discretion, for the government, regulation, and direction of the Library



Company and every member thereof; and for the appointing and regulating the election or nomination of Directors, Treasurer, Librarian, Secretary, and such and so many other officers as they shall think fit; and for limiting and appointing their trust and authority; and for the admitting new members; and to do all things concerning the government, estate, goods, lands, revenues, as also all the business and affairs of the said Company. All which laws, statutes, orders, and constitutions, so to be made as aforesaid, shall be binding on every member, and be, from time to time, inviolably observed, according to the tenor and effect of them, provided that they be not repugnant or contrary to the laws of England or this government. *Provided always*, That for the increase and preservation of the said Library every member of the said Company shall and do pay into the hands of the said Company's Treasurer, for the time being, the sum of ten shillings, on the first Monday in May, in every year forever; and those who neglect so to do shall pay such greater sum or sums in lieu thereof, at such times, within twelve months then next following, as by the laws of the said Company shall be appointed. And that in default of these payments every delinquent shall forfeit his share in the books and estate of the said Company, and be no longer a member. In testimony whereof, we have caused the Great Seal of our said Province to be hereunto affixed. WITNESS, GEORGE THOMAS, Esq., Lieutenant-Governor and Commander-in-Chief of the said Province and Counties, at Philadelphia, the 25th day of March, in the fifteenth year of the reign of our sovereign lord, King George the Second, and in the year of our Lord one thousand seven hundred and forty-two, by virtue of certain powers and authorities to him for this purpose (*inter alia*) granted by the said proprietaries.

GEORGE THOMAS.





The following rules to be observed by *The Library Company of Philadelphia* were adopted at an early date, and have been in force, without variation, to the present time, and are now in force :

*Rules to be Observed by the Library Company of Philadelphia.*

I. THE Librarian shall attend at the Library every day (Sundays excepted), from the first day of April until the first day of October, from two o'clock P. M. until sunset, and from the first day of October until the first day of April, from one o'clock P. M. until sunset. He shall enter in the catalogue kept at the Library such books as may be purchased or added to the Library, label and number the same, as well as all others from which the label or number may be torn off or defaced. He shall also replace the books on the shelves, as they are brought in, as soon as he conveniently can, first having examined whether they are free from damage.

II. He shall lend to any member,

One Folio for five	} Weeks,
One Quarto for three	
One Octavo, or	
Two Duodecimos for two	

and no greater number, unless on hire, or so connected as to be otherwise useless. Such persons, however, who reside at the distance of seven miles or upward, are permitted to have books one week longer than the above-mentioned times. For all books so lent he shall take a note, payable to the Company, for double the value as high as he can estimate, of the book or set of books to which they belong, conditioned to return the same, undefaced, within the time above mentioned ; at the expiration of which (unless application has been made by another member for the same books, and the Librarian requested to take a memorandum thereof), the borrower may,



on producing the book to the Librarian, renew his note for the like time.

III. Every person, not being a member, who shall hire a book, &c., shall first give a note for double the value thereof, in the same manner, and be subject to the same regulations, as a member; and shall also deposit, as security, in the hands of the Librarian, double the value of such book or books; but if the book or books should belong to a set, then such person shall deposit treble the value of the volume or volumes which he shall so take out.

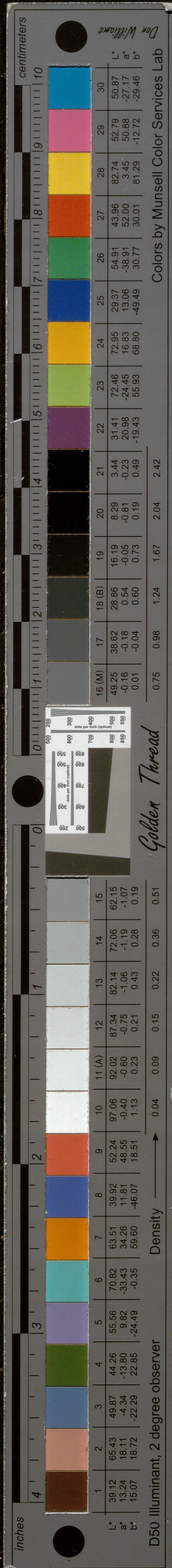
IV. Every member, or other person, who shall take out a book or books on hire, shall pay, for the use of the Library, the following rates, weekly: For Duodecimos and Octavos, two-sixteenths of a dollar; Quartos, three-sixteenths of a dollar; and Folios, four-sixteenths of a dollar; and no smaller sum, although the book may be returned within the week.

V. Every member, or other person, who shall neglect to return the book or books within the time specified in the second rule, shall, for such neglect, pay to the Librarian, for the use of the Library (besides the hire, where the book is not taken out by virtue of a share), two sixteenths of a dollar per week; and if not returned, undefaced, within one month from the expiration of the time limited in the note, the fines and hire accruing thereupon shall be doubled; and if not so returned within three months from the same period, the note or deposit money shall be forfeited to the company.

VI. Books returned are to be delivered into the hands of the Librarian to be examined, whether damaged or not.

VII. No person from whom any hire or forfeiture is due, or who hath damaged any book, shall be permitted to have another book till satisfaction be made.

VIII. If a member, and one who is not a member, should apply for the same book at the same time, the member shall have the preference.





IX. A member may take out on hire, without deposit, as many books in value for which his share in the Library shall, by the Librarian, be deemed a sufficient security, on the same terms, in other respects, as persons who are not members.

X. The Librarian shall furnish the Directors, at each monthly meeting, with an account of the fines and forfeitures which have accrued during the preceding month.

XI. The Librarian is to conform to the instructions of the Directors with regard to such books as, from their scarcity and value, are to be let out only on certain conditions, or not at all.

XII. No person, whether a member or not, is to lend the book or books he borrows to any person out of his dwelling-house.

XIII. No book shall be lent on the share of a deceased member, unless the note be signed by all the executors or administrators of such deceased member, or by some one of them, appointed and authorized by written orders of the others.

[Exhibit C. p. 32 of answer.]

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On the 23d February, 1870, an Act of Assembly was passed in the words following. (Examiner's Rep., p .145.)

#### AN ACT

Relative to the Ridgway Branch of the Philadelphia Library.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That the Library Company of Philadelphia be, and they are hereby authorized, to act as trustees for the Ridgway Branch of the Philadelphia Library and the trusts pertaining thereto under the last will and codicils of James Rush, late of



the city of Philadelphia, Doctor of Medicine, upon the conditions and provisions therein contained, without limitation as to the yearly value or income of the said trust estate, but in such manner that the real and personal property of the Company, including such books, pictures, statues, and other works of literature and art as now are or shall hereafter be held by them, in their own right or on any other of different trusts, shall be in no wise affected thereby, but shall remain and be under their own entire and exclusive control and disposition; and the said Company are hereby empowered after acceptance of this Act by the members of the said Company to apply from time to time to the Court of Common Pleas for the City and County of Philadelphia, for such further amendments to the charter of the Company as may be necessary to carry into effect the conditions and provisions of the said will and codicils in accordance with the directions of this Act.

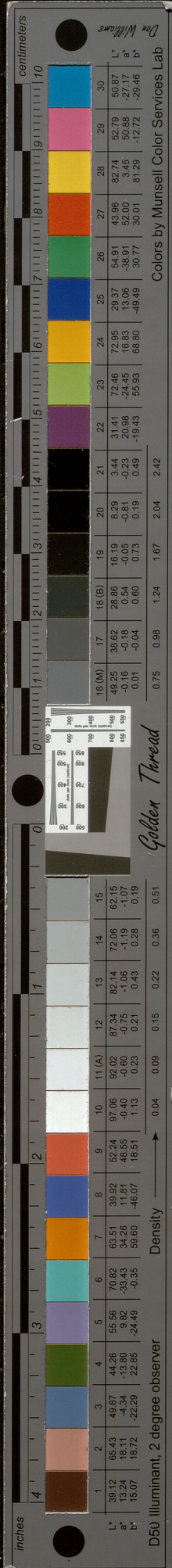
B. B. STRANG,  
*Speaker of the House of Representatives.*  
 CHARLES H. STINSON,  
*Speaker of the Senate.*

Approved the twenty-third day of February, Anno Domini one thousand eight hundred and seventy.

JNO. W. GEARY.

At a meeting of the Corporators of the Library Company, held May 25, 1870, the provisions of this Act were accepted, and the Directors were requested to apply to the Court of Common Pleas of Philadelphia County for certain amendments to the charter of the Company. (Examiner's Rep., p. 147.)

The application was made, and on the 10th December, 1870, the Court of Common Pleas of Philadelphia ordered and decreed that the alterations, improvements and amendments in the words following should be deemed taken to be part of the instrument upon which said Corporation was framed and established, to-wit:





*To the Honorable the Court of Common Pleas for the City and County of Philadelphia :—*

The memorial of the Library Company of Philadelphia respectfully represents to your Honorable Court, that by an Act of Assembly, entitled, "An Act relative to the Ridgway Branch of the Philadelphia Library," approved the twenty-third day of February. A. D. 1870, it was enacted, "That the Library Company of Philadelphia be, and they are hereby authorized, to act as Trustees for the Ridgway Branch of the Philadelphia Library and the trusts pertaining thereto, under the last will and codicils of James Rush, late of the City of Philadelphia, Doctor of Medicine, upon the conditions and provisions therein contained, without limitation as to the yearly value or income of the said trust estate, but in such manner that the real and personal property of the Company, including such books, pictures, statues, and other works of literature and art as now are, or shall hereafter be, held by them in their own right, or on any other or different trusts shall be in no wise affected thereby, but shall remain and be under their entire and exclusive control and disposition; and the said Company are hereby empowered, after acceptance of this Act by the members of the said Company, to apply from time to time to the Court of Common Pleas for the City and County of Philadelphia, for such further amendments to the charter of the Company as may be necessary to carry into effect the conditions and provisions of the said will and codicils in accordance with the directions of this Act."

That at a meeting of the members of the said Company, duly convened on the twenty-fifth day of May, A. D. 1870, it was resolved, "That the Library Company of Philadelphia do accept the provisions of the Act of the General Assembly of the Commonwealth, approved the twenty-third day of February, 1870,



entitled 'An Act relative to the Ridgway Branch of the Philadelphia Library.'"

"*Resolved*, That the Directors be requested to apply to the Court of Common Pleas of Philadelphia County for the following amendments to the charter of the Company," to-wit:

(Prout the same, *supra* p. 147.)

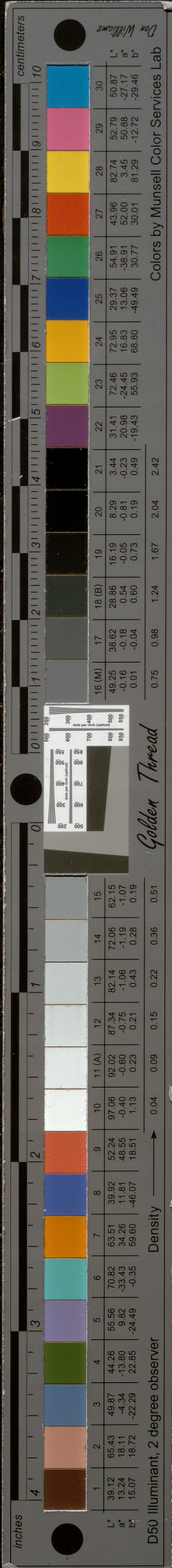
Your petitioners therefore pray that the said amendments may be allowed to be made to the charter of the said Company and form a part thereof, according to the Act of Assembly in such case made and provided.

W. E. WHITMAN, [SEAL.]

*Secretary.*

*City and County of Philadelphia, ss.*

Be it remembered, That at a Court of Common Pleas, held at Philadelphia, on the thirty-first day of October, A. D. 1870, the above and foregoing amendments to the charter of "The Library Company of Philadelphia" were presented to the said court for its approval. Whereupon the court ordered the same to be filed in the Prothonotary's Office of said court, and that public notice be given of the application agreeably to the provisions of the Act of Assembly in such case made and provided. And now, to-wit: December 10, A. D. 1870, due proof having been exhibited of the publication of notice of said application agreeably to the order of the court, and that no cause to the contrary being shown, and it appearing to the court that the said amendments and alterations are and will be lawful and beneficial, on motion of R. C. McMurtrie, Esquire, it is ordered and decreed that the said alterations, improvements, and amendments shall be deemed and taken to be a part of the instrument upon which said corporation was formed and established to all intents and purposes as if the same had been originally made part thereof:





And it is further ordered, that the said amendments be recorded in the office for recording of deeds in and for said county.

[SEAL.] Witness my hand and the seal of the said court  
this sixth day of March, A. D. 1871.

R. DONAGAN,  
*Prothonotary.*

*City of Philadelphia, ss.*

I, John A. Houseman, Recorder of Deeds, &c., for the said city, do hereby certify that the within and foregoing is a true and correct copy of an instrument of writing found of record in my office, in Miscellaneous Book J. A. H., No. 1, page 145.

[SEAL.] Witness my hand and seal of office, this 30th day  
of March, A. D. 1871.

J. A. HOUSEMAN,  
*Recorder.*

*Per M. MYERS.*

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On the 25th of March, 1760, the executors of James Logan granted to Israel Pemberton, William Allen, Richard Peters and Benjamin Franklin, certain real estate and other property, to be held in trust for the support of a Library established by the said James Logan at Sixth and Walnut Streets, Philadelphia, under circumstances recited at great length in the conveyance. The trustees having died, and no others having been appointed, the legislature, on the 31st March, 1792, at the instance of Mr. Logan's heirs, passed an Act of Assembly in these words (omitting the preamble, which is long, and has no bearing on the case in hand).

WHEREAS, &c., &c.

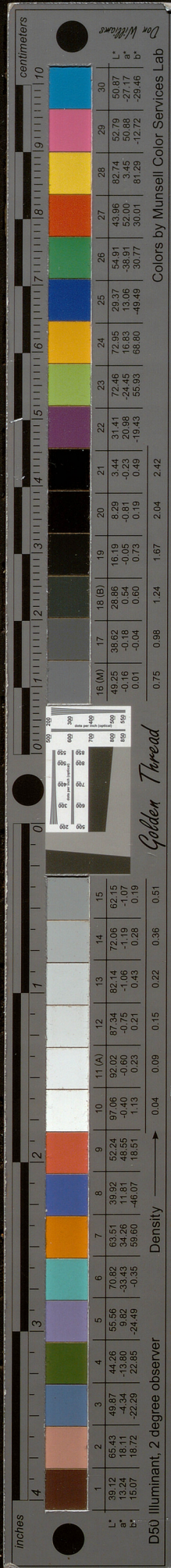
SECTION I. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General*



*Assembly met, and it is hereby enacted by the authority of the same,* That all and singular the aforesaid messuage and lot of ground, two rents charge, with all and every the arrearages thereof, and the books and other property in the said messuage contained, shall be, and they are hereby, vested in the Library Company of Philadelphia, their successors and assigns forever, in trust for the support and increase of the said Loganian Library.

SECT. II. *And be it further enacted by the authority aforesaid,* That the directors of the said Library Company of Philadelphia, for the time being, together with James Logan, and such two other trustees as he shall appoint, a majority of the whole of whom shall be a quorum, shall be trustees of the said Loganian Library, and may and shall, from time to time, make such by-laws, rules, and regulations, for the preservation and management thereof, as consistently as may be with the meaning and instructions of the said donors, as occasion shall require; *Provided always,* That the said books and other property now in the said messuage, and such additions thereto as may be made, shall always be kept separate and apart from the books belonging to the Library Company of Philadelphia, and to be called by the name of the Loganian Library, agreeably to the intention of the donor, and for continuing a succession of trustees, composed of the descendants of the said James Logan the elder, or of persons appointed by such descendants.

SECT. III. *And be it further enacted by the authority aforesaid,* That upon the demise of the said James Logan, son of James Logan, the elder, the next heir male of the said James Logan, the elder, if resident in the City of Philadelphia, or within seven miles thereof, preferring the issue of the eldest son to the issue of the second or other son, and the male line to the female line, and in case of the extinction of the male line, then the eldest heir male in the female line shall always be one of the trustees of the said institution, and shall have power to supply vacancies, in case of the death or resignation of any of the said associate trustees; and in case such male heir shall





not be resident in the said City of Philadelphia, or within seven miles thereof, or shall be in his minority, the survivor or survivors of such associate trustees shall supply such vacancy, as it shall happen.

SECT. IV. *And be it further enacted by the authority aforesaid*, That the said Trustees shall have power to dispose of at public sale, the said messuage and lot of ground in Sixth Street aforesaid, the proceeds whereof shall be applied to the general purposes intended by the donors, and to demand, and by all lawful means levy, recover, and receive all and every the arrears of the said rent's charge, whether the same accrued before the passing of this Act or shall hereafter accrue, by distress or action, in the corporate name of the Library Company of Philadelphia.

Approved, March the thirty-first, 1792.

Other trusts have also been confided to the Library Company. (Bill, page 2; Ans. Sect. 2, page 13).

The collection of books belonging to or held in trust by the Library Company of Philadelphia is very valuable, and is in a building not fire-proof, situate at the north-east corner of Fifth and Library streets.

The Directors of the Philadelphia Library Company, its stock or share-holders and persons interested in its objects, among others the late Dr. James Rush, had been for years striving to raise funds for the erection of a permanent fire-proof building to contain the books belonging to the Company or held in trust by it.



Dr. James Rush died May 26th, 1869. His will and three codicils were proved May 31st, 1869, and on the same date letters testamentary were granted to Henry J. Williams, Esq., the executor named in the will, and the defendant in this suit.

The will bears date February 26th, 1860.

First codicil bears date May 16th, 1866.

Second codicil bears date April 18th, 1867.

Third codicil bears date April 12th, 1869.

The will and first and second codicils alone have provisions which enter into this controversy.

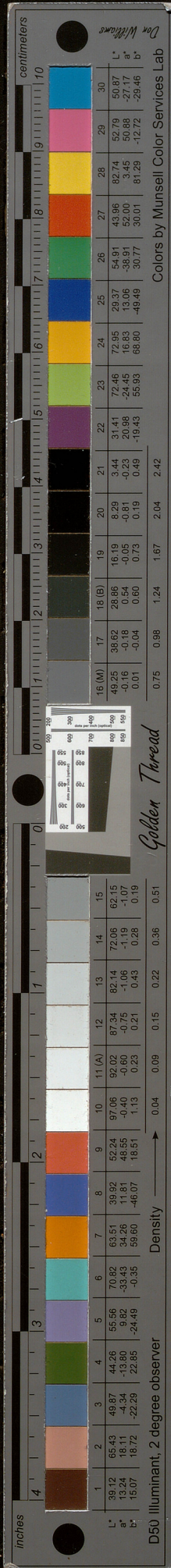
They are as follow :

## WILL OF JAMES RUSH, M. D.

*Be it remembered*, That I, JAMES RUSH, of the city of Philadelphia, M. D., do make this my last will and testament, hereby revoking all others by me heretofore made, in manner following—that is to say :—

I will and direct that all my just debts, which will be found very few in number and insignificant in amount, shall be paid by my executor as soon as possible.

It is my intention, by a codicil or codicils to this my will, to give considerable legacies, annuities, and devises to different persons, but as I desire to take some time for reflection on this subject, and as I have made up my mind as to the disposition of my residuary estate after the payment of these legacies, annuities and devises ; now, therefore, I do hereby give, bequeath, and devise my whole estate, real and personal, legal and equitable, whatsoever and wheresoever the same may be, unto my brother-in-law, HENRY J. WILLIAMS, of the city of Philadelphia, his heirs and assigns, to be held by him for and upon the





following trusts and purposes, and for and upon no other use, trust, or purpose whatsoever—that is to say:—

In trust, after paying, providing for, and complying with all legacies, annuities, gifts, bequests, and devises, declarations, and intentions which may be contained and expressed in any codicil or codicils to this, my last will and testament, which I may hereafter make (to be signed by me at the end thereof), whether the same be formally drawn or not; to have and to hold the whole residue and remainder of my estate, real and personal, whatsoever and wheresoever the same may be, for the following uses and purposes, viz:—

In trust, to select and purchase a lot of ground not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race Streets, in the city of Philadelphia, and thereon to erect a fire-proof building sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia (whose library is now at the corner of Fifth and Library Street), and to provide for its future extension according to plans, directions, and specifications which I shall hereafter make or give; but if I should not make or leave any such plans, directions or specifications, then to erect the same according to his best judgment and to the views which I have expressed to him. It is my wish that this building should be exceedingly substantial, completely fire-proof, without any large, lofty or merely ornamental halls or lecture-rooms; the whole interior to be divided in such a way as to contain the greatest number of books, to be well lighted, and so arranged as to be of easy and convenient access.

AND UPON THIS FURTHER TRUST, so soon as this building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto “The Library Company of Philadelphia” aforesaid, and their successors, for the uses and purposes of their library, and for no other use or purpose whatever.

*Provided*, however, that before any such conveyance shall be

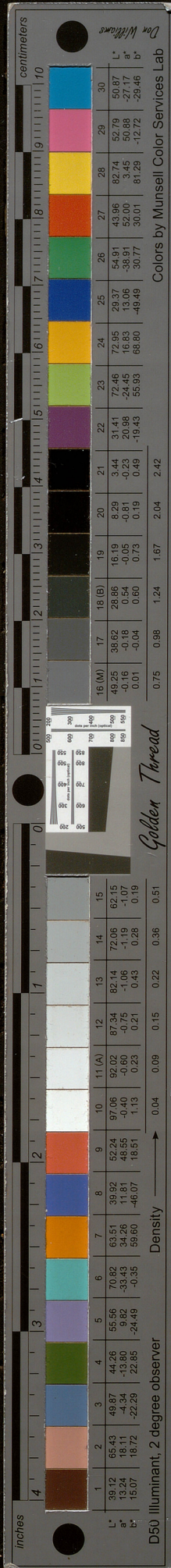


made to the said Library Company they shall, either by an alteration in their charter, or in some other way satisfactory to my executor, bind themselves and their successors to conform to and comply with the following express conditions, and any others I may hereafter impose, under which they are to hold the said property and all other bequests and devises herein or hereafter given to them:—

*First.* That the said Library Company shall not cause, allow, or permit any lectures, public orations, or oral addresses or exhibitions of any kind to be delivered, given, or to take place on the said lot of ground, or in the said building; nor shall they cause, allow, or permit the formation of any museum, cabinet, gallery, or collection of natural history, statuary, sculpture, portraits, or paintings thereon or therein; nor shall they use, apply, or expend any funds, derived from me, or under my will or any codicil thereto, in procuring or defraying the expenses of any such lectures or exhibitions, public orations, or oral addresses, or in the establishment or support of or for additions to any such museum, cabinet, gallery, or collection, painting, or portraits (and especially that of the testator) on the said lot and in the said building or elsewhere.

These are objects foreign to and inconsistent with the legitimate purposes of a public library, and it is only for the preservation, extension, and free and convenient use of such a library, without any ambitious or pretentious display, that it is desired to make provision.

*Second.* That all the accounts of the receipts and expenditures from the estates aforesaid, real and personal, shall be kept separate and distinct from all other accounts of the said Library Company, and shall all be headed and kept as the accounts of "THE RIDGWAY BRANCH OF THE LIBRARY COMPANY OF PHILADELPHIA," so that it may be always easily and certainly ascertained whether the application of those estates and the the income derived therefrom has been in accordance with the provisions of this my will.





And I further will, direct, bequeath, and devise that whenever the said building shall have been completed and transferred to the said Library Company, and the preliminary conditions complied with, then my said executor shall assign, transfer, and convey, by one or more deeds and instruments, all the rest and remainder of my residuary estate not laid out and expended in the purchase of the lot and the construction of the building aforesaid, and in the legal and customary charges and expenses, unto the said Library Company, to be held and used by them and their successors for the following uses, trusts, and purposes:—

*First.* In trust to keep the whole of the real estate granted and conveyed to them by my executor, in good order and repair, and to make, from time to time, such additions to the library building as may be found necessary for the extension and preservation and convenient use of the said library, *and all additions thereto.*

*Second.* In trust, after paying all necessary taxes, charges and expenses incident to the said property, to set aside annually ten per cent. of the clear net income, to form a contingent fund, to be invested, and the interest added to the principal, which fund, or so much thereof as may be required, shall be applied:—

First. To build upon, improve, alter, and renew any lands and tenements hereby devised to the said Company, so as to increase the income derived therefrom.

Second. To make good and replace any losses from the failure of any investments made of or from the property hereby bequeathed for the said Company; and,

Third. Whenever the said contingent fund shall amount to \$30,000, then to pay over and apply the whole surplus beyond the said \$30,000 for the general purposes to which the income of this residuary estate is herein directed to be applied.

*Third.* In trust to pay all necessary salaries of the librarian



and his assistants, and the expenses of binding and preserving the books of the whole library, making cheap catalogues, and all charges incident to its care and management. The said library is to be kept open from nine o'clock A. M. until at or near sunset, except on Sundays and holidays.

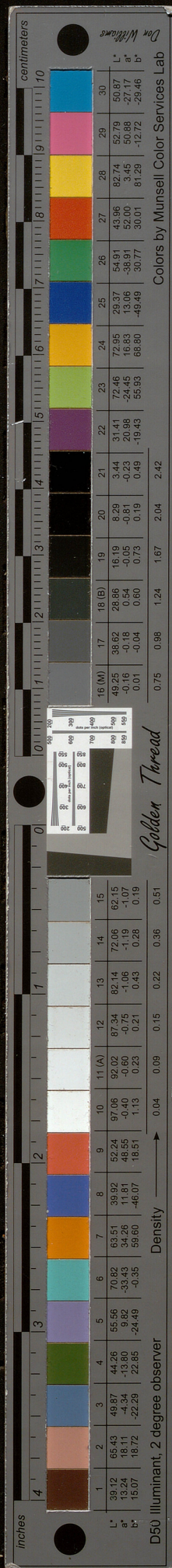
*Fourth.* And in trust, after complying with and fulfilling the previous trusts and purposes hereinbefore contained and expressed, to apply the remainder or surplus of the said net annual income, or so much thereof as may be necessary or desirable, to the increase and extension of *the said library*.

But I direct that no portion of my real estate aforesaid shall be sold by the Library Company for ten years after my death, nor then, unless it be absolutely necessary for the purposes of this trust, even if additional income should be derived therefrom; and in no case, unless the said sales are sanctioned by a decree of the Orphans' Court or a Court of equity, which shall decide such sales are not in contravention of the spirit of this my will.

And in order to enable my executor to carry out the directions of this my will, I hereby authorize and empower him to grant, bargain, and sell any part or parts of my real estate, at public or private sale, for any price or consideration, with any restrictions, reservations, covenants, or conditions, for cash or on credit, taking security on the premises for the balance of the purchase moneys; or to let on ground rent, mortgage, exchange, or make partition of the same, or any part or parts thereof; and to seal, execute, and deliver all deeds, conveyances, mortgages, assurances or other instruments, necessary for the purposes aforesaid, without any obligation on the purchaser or purchasers to see to or be responsible for the application of the purchase money or other consideration, or for the propriety of the exercise of this power.

And I further will, devise, and direct that all investments, if any should be made by my executor, and all those which may at any time hereafter be made by the said Library Com-

*Over note  
related to  
library lot  
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pany from the principal or income of my said estate shall be in ground rents or other real estate in the State of Pennsylvania, or in bonds and mortgages upon property within the said State, or in loans of the said State, or of the United States; and lastly, I hereby appoint my brother-in-law, Henry J. Williams, of the City of Philadelphia, executor of this my last will and testament.

In witness whereof, I have hereunto set my hand and seal this twenty-sixth day of February, A. D. eighteen hundred and sixty (1860).

(Signed),

JAMES RUSH.

Witnesses—WM. F. JUDSON,  
J. S. FARMER,  
R. S. HUNTER,  
J. S. FARMER.

October 16, 1865.

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#### FIRST CODICIL.

*Be it remembered*, That I, JAMES RUSH, of the City of Philadelphia, M. D., do make this codicil to my last will and testament, dated the twenty-sixth day of February, A. D. eighteen hundred and sixty (1860), in manner following—that is to say:—

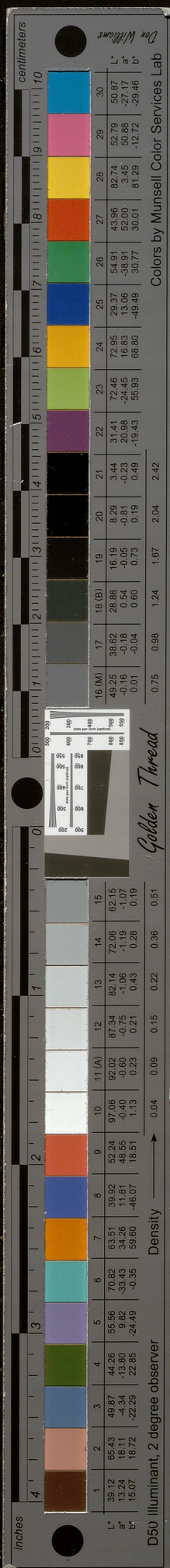
*Whereas*, By my said last will and testament I have provided that the bequests and devises to the Library Company of Philadelphia are to be held under the conditions and restrictions therein contained, and any others which I might thereafter impose; now, therefore, in accordance with, and in execution of that provision, I add and impose the following conditions, restrictions, and directions:—



*First.* One of my objects in giving my residuary estate for the use of the said Library Company was to express my respect and regard for my father-in-law, the late Jacob Ridgway, and my affection for, and gratitude to, his daughter, Phoebe Anne Rush, by erecting to their memories a monument which I hope will prove more durable than any other grateful record I could make, and be infinitely more useful to the community. As it was from them I derived the greater part of my property, which (under the special and prudent management of faithful and trustworthy agents) has enabled me to devote happily, and undisturbed, the latter part of my life to pursuits of scientific inquiry, which I have designed to be more beneficial than the more common enjoyment of an ample fortune, it is both just and proper that I should thus employ it, the more especially as Mrs. Rush had led me to believe that if she had survived me, she would have applied it to a similar purpose. Now, in order to carry out this intention in a public and permanent form, I direct my executor to have a marble slab, with the following inscription, on a plain ground, with a border of simple moulding, without any surrounding ornaments, placed and maintained on some appropriate part of one of the interior rooms of the new Library building, in which my private library and other personal effects are to be preserved.

THE RIDGWAY BRANCH  
OF THE  
PHILADELPHIA LIBRARY.  
A MONUMENT TO THE MEMORY OF  
JACOB RIDGWAY  
AND OF HIS DAUGHTER,  
MRS. PHEBE ANNE RUSH.

*Second.* I direct my executor to have inserted in the Act of Assembly which will be required to carry out the provisions of my will and codicils, clauses enacting:—





First. That not more than one-fourth of the directors of the library shall belong to any one of the three learned professions of law, theology, or medicine. This clause is, however, not intended to exclude any of the present members from re-election.

Second. That the number of shares in the library shall be limited to those actually issued at the time of my death. But the managers, by their by-laws, shall have the authority to allow any respectable person depositing an amount and paying an annual sum to be fixed by the Board of Managers, to have the full and free use of the library, as completely as if they were shareholders.

Third. That the library shall not connect themselves with any other body, corporate or politic; my residuary estate will form a large fund for the use of the library, and I wish them to be free from every inducement to go beyond what I consider the legitimate objects of a library company.

*Third.* I will add that my reasons for choosing the Philadelphia Library Company for my residuary legatee and devisee are because it has always been conducted quietly and unobtrusively, steadily pursuing the appropriate objects for which such libraries were established, keeping entirely aloof from the excitement of politics and of other means whereby public bodies so frequently seek to obtain an evanescent and mischievous notoriety, and because during my early life I derived great pleasure and advantage from the use of its books, and from the readiness and civility with which they were always furnished me.

*Fourth.* I understand that the Managers of the Library Company have never applied any of its funds to defray the expenses of the very simple refreshments of which they are accustomed to partake at the monthly meetings of the Board, but have invariably paid them from their own personal means.

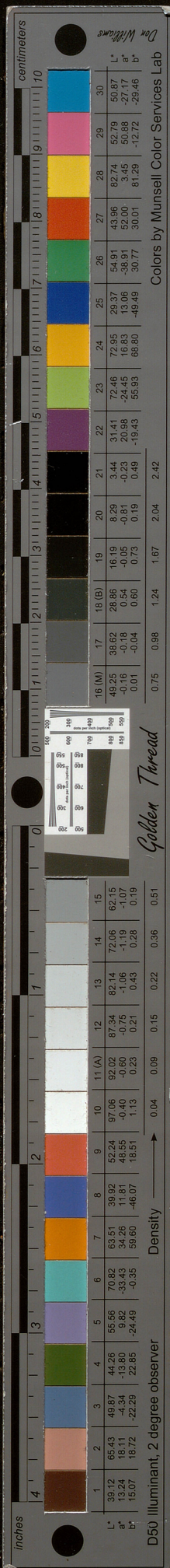


I highly approve of this course, which I fear is not very usual, and in order that their example may be followed by their successors, I direct that no part of the funds of the Ridgway Branch of the Philadelphia Library shall ever be used or expended in providing refreshments, lunches (so called), feasts, or entertainments for managers, visitors, shareholders, or for any other persons whatever.

*Fifth.* I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency. Temperate, sincere, and intelligent inquiry and discussion are only to be dreaded by the advocates of error. The truth need not fear them, nor do I wish the Ridgway Branch of the Philadelphia Library to be encumbered with the ephemeral biographies, novels, and works of fiction or amusement, newspapers or periodicals, which form so large a part of the current literature of the day. The great object of a public library is to bring within the reach of the reader and student, works which private collections do not, and cannot contain, and which in no other way could be accessible to the public. Its excellence will depend—not upon the number of its volumes—but upon their intrinsic value, and I wish this principle to be carried out by the managers, who I hope will never be influenced by the too common ambition for mere numerical superiority.

*Sixth.* I give and bequeath all my pictures, my private library, my manuscripts, copyrights, and papers, and also those of my father, Dr. Benjamin Rush (in my possession) to the Library Company, to be by them placed in a room in the new building, and there safely kept. The books may be used as the other books of the Library Company, but this room is not to be opened to gratify idle or objectless curiosity.

*Seventh.* I will and direct that the building to be erected for the Philadelphia Library Company, under the provisions of





my will, shall have a basement story, of a height not less than eight feet six inches above the level of the pavement at its front, leaving the height of such basement in the rear to depend upon the grade for the drainage of the lot. The entrance to the front of the story, immediately above the basement, shall be by a broad flight of stone steps. Other entrances may be made in such places and manner as convenience or necessity may require.

*Eighth.* If the Philadelphia Library Company should omit or decline to accept my residuary estate on the terms and conditions in my will and codicils contained, or fail to comply with any of the preliminary stipulations and directions therein mentioned, then I give and devise the whole residue of my estate, real and personal, whatsoever and wheresoever the same may be, after paying and securing all annuities, bequests, legacies and devises, other than those to the said Library Company in this, or any future codicil contained, unto HENRY J. WILLIAMS, my executor, in my said last will named, his heirs, executors and administrators in trust therewith, to found and endow a public library entirely distinct from and independent of the Philadelphia Library Company, to be named and called the Ridgway Library, under the rules, regulations, conditions and stipulations in my said last will, and the codicils thereto expressed and contained. I wish that the greater part of my estate may be spent in completing the new library building. The annuities as they expire and fall into my residuary estate will be amply sufficient for all the legitimate purposes of a library.

*Ninth.* By my last will and testament hereinbefore referred to (dated February 26, 1860), I have given, bequeathed, and devised my whole estate, real and personal, unto HENRY J. WILLIAMS, my executor, his heirs, executors, administrators, and assigns, in trust; in the first place to provide for, pay, and comply with all legacies, gifts, annuities, bequests, and devises, declarations, and intentions, which may be contained or expressed in any codicil to the said last mentioned will and testa-



ment, which I might thereafter make, to be signed by me at the end thereof, whether formally drawn or not; now, therefore, in pursuance of the above provision, I hereby direct, declare, bequeath, and devise as follows:—

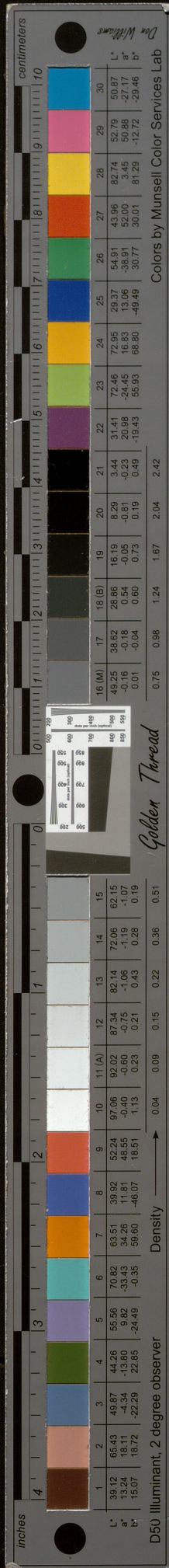
*Tenth.* I give and bequeath unto Mary Lee, a domestic in my service, the sum of two hundred dollars, to be paid to her within six months after my decease; and unto Anne Knee, my faithful attendant for some years, an annuity or yearly sum of two hundred dollars, payable half-yearly so long as she shall continue single and unmarried. The said legacy to Mary Lee and the annuity to Anne Knee to be paid to them only in case they shall respectively remain in my service until the day of my death, and in the service of my executor at the same rate of wages which they receive from me, so long as he may require them to do so.

*Eleventh.* I give and bequeath unto Mrs. Catharine Souder, widow of Jacob Souder, deceased, an annuity or yearly sum of two hundred dollars, to be paid to her half-yearly so long as she shall continue a widow.

*Twelfth.* I give and bequeath unto Thomas Craven, who has been for many years the faithful agent of my estate, an annuity or yearly sum of six hundred dollars, to be paid to him half-yearly for and during his natural life.

*Thirteenth.* I give and bequeath unto Miss Caroline Little and her sister, Mrs. S. H. Spruill, and to the survivor of them, an annuity or yearly sum of eighteen hundred dollars, to be paid to them and to the survivor of them so long as they or either of them shall continue unmarried, and if either of them should marry after my death, then the whole of the said annuity shall be paid to the other so long as she shall continue unmarried, as aforesaid.

*Fourteenth.* I give and bequeath unto Miss Mary Ritchie (the sister of Captain Ritchie, U. S. Navy), an annuity or





yearly sum of one thousand dollars, to be paid to her half-yearly, so long as she shall remain single and unmarried.

*Fifteenth.* I give and bequeath unto each of my nephews and nieces, Benjamin, Maria, S. Catharine, and Richard H. Rush, children of my brother, the late Richard Rush, an annuity or yearly sum of three hundred and sixty dollars, to be paid half-yearly to each of my said nephews for and during their natural lives, and to each of my said nieces so long as they respectively shall continue single and unmarried without any survivorship. These several annuities, with one of a similar amount which I intended to have given to their brother, the late J. Murray Rush, make together the sum of eighteen hundred dollars per annum, which I had designed for the children left by my brother, Richard Rush.

*Sixteenth.* I give and bequeath unto my niece, Mrs. Georgiana Clark, wife of E. A. Clark, Esq., and daughter of my sister, Mrs. Emily Cuthbert, of Lanoraie, Canada East, an annuity or yearly sum of eighteen hundred dollars, to be paid to her half-yearly so long as she shall continue the wife or widow of her present husband.

*Seventeenth.* I give and bequeath unto my nephew, Major Robert Manners, and to my niece, Julia Manners, children of my sister, Mrs. Mary Manners, now residing near Rochester, Kent, England, annuities or yearly sums of nine hundred dollars each, to be paid to my said nephew half-yearly for and during his natural life, and to my said niece so long as she shall continue single and unmarried.

*Eighteenth.* I give and bequeath unto my niece, Julia W. Biddle, wife of Colonel Alexander Biddle, of the city of Philadelphia, and daughter of my late brother, Samuel Rush, an annuity of eighteen hundred dollars, to be paid to her half-yearly so long as she shall continue the wife or the widow of her present husband.

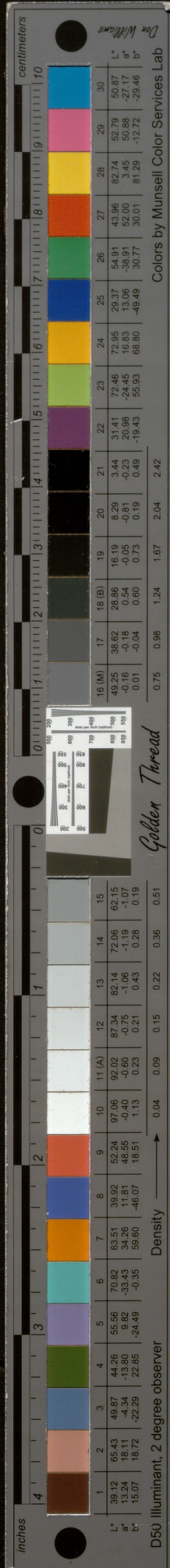


*Nineteenth.* I give and bequeath my four Ridgway silver dishes to my brother-in-law, John J. Ridgway, now residing in Paris.

*Twentieth.* I give and bequeath all the personal wearing apparel, watches, jewelry, trinkets, &c., of my late wife and of myself, to my executor, to be disposed of according to verbal directions which I have given him, but without any obligation to account to any person whatever for them, or any of them, or for the disposition thereof.

*Twenty-first.* As the delays of the law, of the courts, or of the lawyers, may prevent me from disposing, in my lifetime, of my share of my brother, William Rush's estate, in case I should not have done so in my lifetime, I give and devise the whole thereof to my niece, Mrs. Georgianna Clark, daughter of my sister, Mrs. Emily Cuthbert, her heirs, executors, and administrators, as a remuneration for *her* mother's share of *my* mother's estate, of which she was thoughtlessly and ungenerously deprived.

*Twenty-second.* I will and direct that all legacy or collateral inheritance taxes chargeable upon the bequests, legacies, and annuities given or bequeathed by my last will and testament or by any codicil thereto, shall be paid from and out of my residuary estate, and that all the annuities therein and thereby given shall commence from the day of my death. I also will and direct that all the annuities which I have given, or may hereafter give to any married lady, shall be for their sole and separate use, freed from all debts, obligations or control of their respective husbands; and that all the annuities which I have given to any female, married or single, or which I may hereafter give them, shall be payable to them personally, or to their own order or receipt, signed and dated not more than three months before the same falls or becomes due, and shall not be subject to any anticipation, lien, or incumbrance, nor to any transfer or assignment by their own act, or by the act or operation of law, or otherwise. And in case any of the said female





annuitants shall attempt to alien, anticipate, encumber, or assign her annuity, or cause, or permit, or suffer, or procure it to be done, then and in that case, I authorize and empower my executor, in his discretion, to withhold the semi-annual payments thereof (which shall fall into and become part of my residuary estate), until the attempted alienation, anticipation, lien or encumbrance, transfer or assignment shall be cancelled, released, given up, and annulled. And I further will and direct that all the annuities which I have given, or which I may hereafter give, shall, upon the expiration of the periods for which they were respectively given, fall into and become part of my residuary estate.

*Twenty-third.* I direct my executors to dispose of the perishable part of my furniture, but not to have any auction upon any part of my premises. I wish it sold as quietly as possible, and would prefer a private sale, even if it were not so productive. I also direct my executor to keep my residence, No. 1914 Chestnut Street, for at least two years, unless he can dispose of it at private sale for a price which, in his sole discretion, he may think reasonable. At the expiration of that time he may dispose of it as he may think best.

*Twenty-fourth.* I have given verbal directions to my executor to have my funeral as private as possible, without any of the ordinary external indications of mourning.

No invitations are to be sent, except to my *nearest* relations, and I specially desire that I may be buried in silence. If circumstances will permit it, I should be glad that the remains of the late Jacob Ridgway, of his daughter, my late wife, and of myself, should be removed to the new library building, when it is completed, and be placed in some spot within the outward limits of the building, under a plain and simple tablet. The library itself is intended for their monument, and I want none for myself. If, however, the parties interested in the ground in which my father-in-law is buried should object to his re-

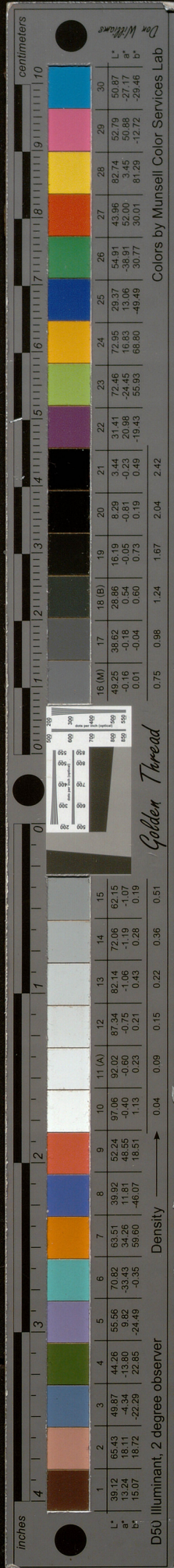


moval, then I desire that my wife and myself may be placed in the new library building as above directed. The library will then be her monument, and I desire to lie by her side.

*Twenty-fifth.* And I further will and direct that if any of the devisees or legatees or annuitants herein named shall attempt, themselves, or aid, assist, or encourage others to question, dispute, litigate, or object to the validity or effect of any part or portion of my will, or any codicil thereto, or of any gift or devise therein mentioned, then, and in that case, all the clauses in my said will or any codicil thereto conferring any benefit upon the person or persons aforesaid shall stand and be revoked and annulled, and the same shall be paid and given over to the said Library Company.

*Twenty-sixth.* Events and circumstances occurring within the last six years have obliged me to make several changes in my will, and I should have preferred that all my testamentary dispositions should have appeared as a complete whole, instead of being contained in separate instruments; but at my age life is precarious, and were I to have them condensed, redrawn, and re-executed, the most important part of the whole might fail under the operation of the ill-conceived, inconvenient, and mischievous law (resulting from a narrow sectarian spirit) which avoids all gifts to literary or religious institutions made and witnessed within a calendar month of the termination of a testator's life, no matter what his mental capacity may have been. To avoid the possibility of such a result, I must let it stand as it is, and add other provisions as they may occur to me.

*Twenty-seventh.* If any annuitant in any codicil to my last will named, whose residence is in the United States of America, shall leave this country after my death to remain either temporarily or permanently abroad, I will and direct that their respective annuities shall be suspended until their return; and the several half yearly payments becoming due during their absence shall fall into and become part of my residuary estate.





*Twenty-eighth.* I desire my executor to be allowed a commission of three per cent. upon the administration of my estate; and, in the case of the death of my brother-in-law, HENRY J. WILLIAMS, whom I have named as my executor in my last will, either before or after me, I nominate and appoint Colonel Alexander Biddle and Thomas Craven to be my executors in his room. They are not, however, to assume the executorship, or be qualified therefor, until after his death, resignation, or refusal to act.

In witness whereof, I have hereunto set my hand and seal this sixteenth day of May, An. Dom. eighteen hundred and sixty-six (1866).

(Signed), JAMES RUSH [SEAL.]

Signed, sealed, published, and declared by Dr. JAMES RUSH above named, as and for a codicil to his last will and testament, in our presence, who, in his presence and in presence of each other, at his request, have affixed our names as witnesses thereto.

J. S. FARMER, May 16, 1866.

RICHARD S. HUNTER, May 16, 1866.

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#### ADDITIONAL CODICIL.

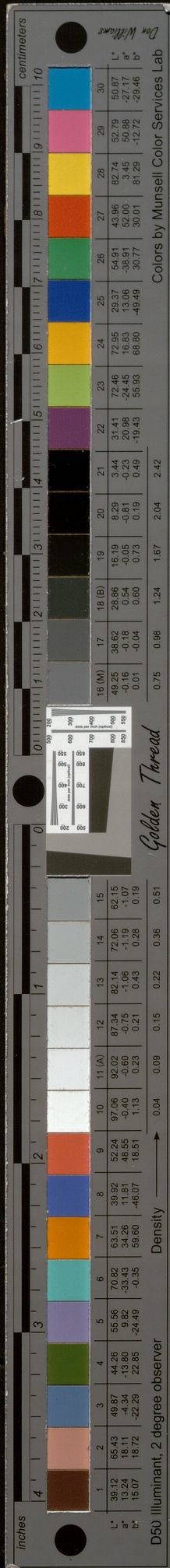
*Be it remembered* That I, JAMES RUSH, of the City of Philadelphia, M. D., do make this additional codicil to my last will and testament, dated the twenty-sixth day of February, A. D. (1860) eighteen hundred and sixty, in manner following—that is to say :—

*First.* I have given and devised the greater part of my estate to my executor for the purpose of erecting for the Library Company of Philadelphia a building not only large



enough to contain their present books, but also their probable increase for many years to come. Now, as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate (not a competing) increase of the library and their current expenses (not to be so large as to invite extravagance and waste), for which purposes the sums to be set apart to secure the legacies and annuities given by my said will and testament will be sufficient, I hereby authorize and direct my said executor to expend the whole remainder of my estate in the purchase of a lot and the erection of the library building, construction of book-cases, &c., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution.

I have observed that large annual incomes in corporate bodies almost invariably lead to wasteful extravagance, and cause the institutions to become the prey of schemers, who, under the spacious cloak of liberality, or of being what is called public-spirited citizens, have no hesitation in spending the money of other people, in order to gratify their own vanity, or to promote their private interests. Such persons pass so much of their time in the distraction of change from one place of popular importance to another, that they have no opportunity for observation and reflection, to gain intellect enough to comprehend the purpose of books of knowledge, and therefore can be of no service, but rather the means of disturbing the quiet duties of a public library. Let them find instruction in its volumes with thankfulness and modesty, yet beware of admitting them to even a part of its government, or they will be sure—unless the managers are wise and watchful—by some manœuvre to direct the whole. They are consequential spend-thrifts, who, under the plea of patriotic improvement and of ornamenting a city, misapply government taxes, and embarrass the funds of scientific, literary, and charitable, as well as moneyed, institutions, over which, by popular artifice, they have gained a control. As a condition, therefore, of my will, let the managers and contributors join to exclude all such per-





sons from the direction of the Library Company. It is from the quiet, unostentatious, and disinterested character of its directors, and of their management, that I have drawn the motives which induced me to choose the Philadelphia Library Company as the heir to my estate; and I would add a very influential consideration, that, having always conducted its affairs with prudence and foresight, it has never, by living beyond its means, in collecting more books than it has room for, been brought to the disgraceful pauper condition of those institutions which are constantly begging for thousands, and drawing upon the public purse by fairs and lotteries, in order to erect splendid buildings, or to pay debts rashly and inconsiderately incurred.

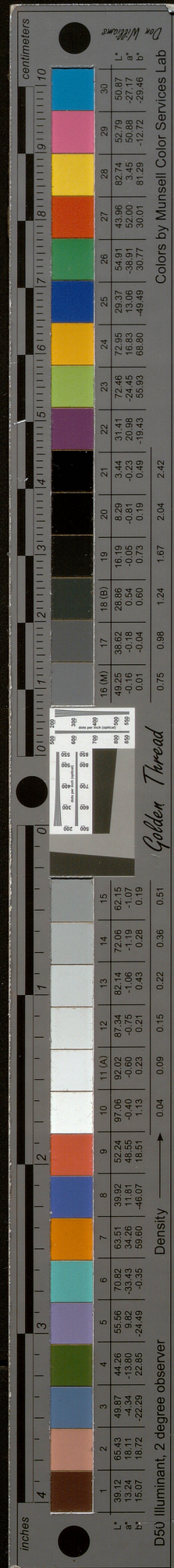
*Second.* I have in my will limited the extent of the lot to be purchased for the library building, as well as its locality; but as I desire that it shall have not only strength, durability, and accommodation, but also be of sufficient magnitude for any future or contingent, but not an ambitious or competing, increase of the library; in order to prevent, if possible, its being torn down in twenty years, and the lot sold at a speculative profit to suit the hyperbole of the times, I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, and select any situation he may deem most expedient, without regard to any provision of my will or codicils. I know that an ostentatious library, to keep up with the progress of our country, collecting too many books, may be like an avaricious man who accumulates money to the ruin of both his modesty and his intellect. But I have a forlorn hope that the mind may yet be improved beyond a patronage or even a toleration of those crowds of graver or more puerile fictionists who mislead the idle, and of those garbling compilers who overlook or corrupt the truth of fuller and more useful works by purloining from their pages, in attempting to abbreviate and render them popular for their own advantage.



*Third.* I have given the copyrights of all my works to the Library Company, and I will and direct that they shall, for the next half century, publish every ten years (and earlier and oftener if called for) an edition of five hundred copies of any or of all of them, so that they shall always have on hand a number sufficient to supply any demand which may be made for any or either of them, at a price not exceeding the cost of publication. I leave additions and corrections in the printer's copies, preparatory to a subsequent edition which I imperatively require to be published exactly as they are left. The original parts of them have been written *without assistance*, and I wish to be alone responsible for all the faults of thought, division, definition, and style, and of my corrected orthography, as I consider it.

An editor sometimes joins himself to a work by a supposed emendation of it. Let him in a book of his own justly blame what he pleases in mine, but not attempt to suit it to any future times and manners. Every writing should have its own times and manners. Let him prevent, not imagine typographical errors; let him strive to improve my spelling only when the world corrects its own redundancies and confusions on that point. In our important faults it is bad morality, even in science and literature, to try to escape the charge of errors by turning them over to others for correction.

*Fourth.* In order to insure, as far as is in my power, the application of the various devises and bequests which I have made for the use and benefit of the Library Company, in accordance with my wishes and directions, I hereby devise, direct, will, and declare that the whole and every part of my estate, real and personal, given or devised for the use and benefit of the said Library Company, and all the books and furniture purchased by them with the income and proceeds thereof, shall be taken and held by them (whenever the same by the provisions of my will, or of any codicil thereto, shall come into their possession, and become subject to their control,) as trustees, for





the uses, objects, trusts, and purposes in my said will, and any codicil thereto mentioned and expressed; and if the said Library Company shall in any respect violate, or omit to comply with, any of the provisions, conditions, or directions, regulations, or restrictions therein contained; then I will and direct that the Pennsylvania Company for Insurances on Lives and Granting Annuities, shall and may (or if they omit, neglect, or refuse so to do, any citizen of the city of Philadelphia) apply to the proper courts of this Commonwealth to compel the said Library Company to comply with the provisions of my said will and codicils, or to remove them from the said trusts, and transfer the whole real and personal estate aforesaid, including the library building, and all the books and furniture belonging to the Ridgeway Branch of the Philadelphia Library, unto the said Pennsylvania Company for Insurances on Lives and Granting Annuities; or, if they shall neglect or refuse to accept this trust, to some other trust company of the city of Philadelphia, who shall take and hold the whole of the said estates, real and personal, library building, books, and furniture aforesaid, in trust to collect and receive the whole income thereof, and apply the same to the uses, objects, and purposes of my said will and codicils thereof; permitting, however, if in their sole discretion they shall think proper so to do, but not otherwise, the said Philadelphia Library Company to occupy the Library building, and to take charge of the books, &c., of the Ridgeway branch thereof; provided they shall do so under the absolute direction and control of the new trustees, who shall strictly supervise and entirely control and direct all the expenditures of my estate in relation thereto; and who may, at any time, remove them from the said charge, if the Library Company shall not submit and conform to such control and direction.

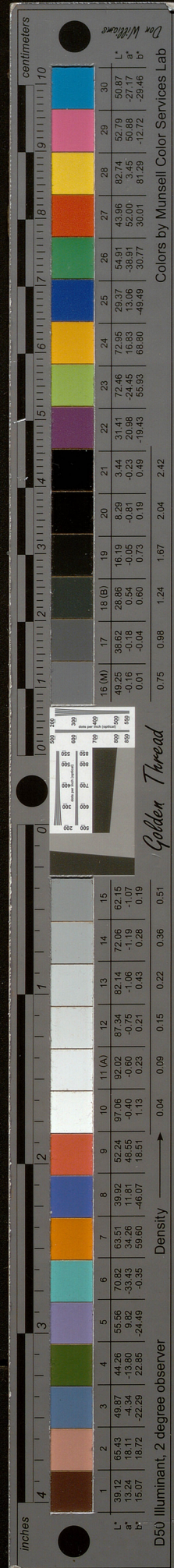
*Fifth.* If at any time Mr. Thomas Craven should take out letters testamentary to my estate, I will and direct that the amount of the annuity heretofore given him shall be credited to my estate, and deducted from the commissions to which he will



be by law annually entitled; and if those annual commissions should not equal the amount of such annuity, it shall be taken and considered as full payment thereof.

*Sixth.* I desire to express still more emphatically than I have yet done my wish and direction that the Library Company shall never make any efforts to rival the other libraries of America or of Europe in the mere number of volumes they contain. If the amount of books in the Philadelphia Library is simply recorded in its catalogue, it will be sufficient for every useful purpose; and what ever its number may be, it need not be held in the gloom of discontent at its inferiority to others, nor in a prideful exultation at its excess above them. Let it rest in a modest contentment in the useful quality of its volumes for the benefit, not the amusement alone, of the public; nor let it, over an ambitious store of inferior printed paper, flap its flimsy leaves, and crow out the highest number of worthless books. Let it be a favor for the eminent works of fiction to be found upon its shelves; but let it not keep cushioned seats for time-wasting and lounging readers, nor places for every-day novels, mind-tainting reviews, controversial politics, scribblings of poetry and prose, biographies of unknown names, nor for those teachers of disjointed thinking, the daily newspapers, except, perhaps, for reference to support, since such an authority could never prove the authentic date of an event. In short, let the managers think only of the intrinsic value of the additions to their shelves; for I hope (yet fearfully) that the streams flowing into the library will be clear, pure, and deep, diffusing healthy, truthful, and valuable information throughout the community, and not to be overborne by a common flood of cotemporary literature, that may sweep off the firm foundations of knowledge, and leave no high places for a useful intellect to rest upon, to extend its bounties, and to be secure.

To assist in accomplishing the purposes of instruction above declared, let the contributors strive to elect to the management, if they can be found, at least one or two persons of *general*





*knowledge*,—men of more than common college and high-school education, with broad observation, reflection, and taste, and liberal thoughts; not sectarian to any of the professions, nor to the gains of trade and speculation, but those who have been called “men of good choice,” and who may have wider views in government and selection than are commonly taken by the conventional and popular character of most public beneficiaries; recollecting not only there is safety in the multitude and agreement of counsel, but that wisdom, too, should there be found which will insure safety in giving the broadest intellect with its widest compass the opportunity to enlighten, to caution, and to extend the capacity of those whose occasions, or means, or disposition may have prevented their thinking it necessary to go beyond the self-satisfied character of a majority.

In witness whereof I have hereunto set my hand and seal, this eighteenth day of April, An. Dom. eighteen hundred and sixty seven (1867).

(Signed) JAMES RUSH. [SEAL.]

Signed, sealed, published, and declared by the above named Dr. James Rush, as and for a codicil to his last will and testament, in our presence, who, in his presence and in presence of each at his request, have hereunto set our hands as witnesses thereto.

J. S. FARMER, April 18th, 1867.

R. S. HUNTER, April 18th, 1867.

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The testator, on the 18th of May, 1869, eight days before his death, agreed, through Mr. Williams, for the purchase of a square of ground situate at Broad and Christian streets, intending that the library building should be erected on that lot.

The conveyance was not executed until some time after the death of Dr. Rush.

Between the 18th of May, the day the contract for the purchase bore date, and the day of the death of Dr. Rush, some



conversation passed between Dr. Rush and Mr. Williams as to whether the Library Company would approve of the location.

(Mr. Williams' testimony, page 197 Examiner's Report.)

After this conversation, and in consequence of it, as it would seem, Mr. Williams called upon Mr. Henry Wharton and Mr. Alexander Biddle to obtain their views on the subject.\*

These gentlemen are all of the highest character. There can be no doubt what each says he believes to be the exact truth.

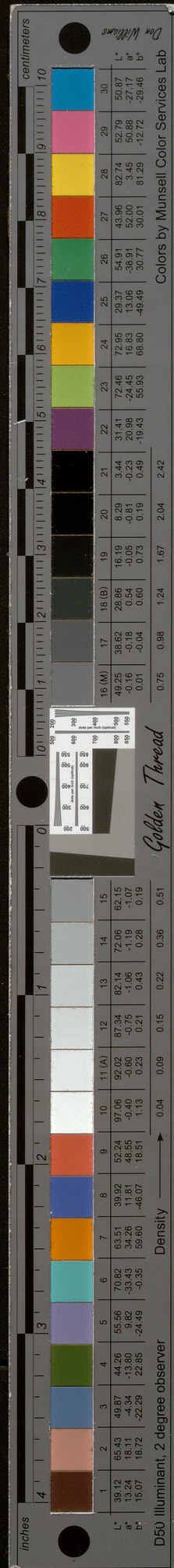
They failed to understand each other, owing, probably, to the fact that the conversation was hurried, and Mr. Williams and Mr. Wharton, at least, were looking at the matter from different stand-points, and were on an unequal footing so far as their knowledge of Dr. Rush's will was concerned.

Mr. Wharton, under the impression that the lot at Broad and Christian streets was to be given for the building, with a large endowment fund to extend and increase the library (meaning the books), expressed it as his personal opinion that the Directors ought to advise the stockholders to accept this gift, rather than that such a munificent gift should be lost to the City of Philadelphia. (Examiner's Report, p. 22.)

Mr. Williams, knowing the contents of Dr. Rush's will, and what he himself intended to say, had a different impression of the conversation, and takes the result of the conversation to be an absolute approval by Messrs. Wharton and Biddle of the projected purchase (Examiner's Report, p. 207), and on the strength of that conviction, reported the conversation in that sense to Dr. Rush.

Mr. Biddle's recollection of the conversation is given at page 222 of the Examiner's Report.

\* Mr. Williams, as a Director of the Library, had, on the 24th of April, 1869, preceding, been appointed, with Mr. H. Wharton and Mr. A. Biddle, a committee of three to select a suitable lot for a library building. On the 4th of November, 1869, this committee seems to have been changed for another, consisting of Messrs. Wharton, McCall, and Morris Waln, whose action resulted in the purchase January, 1870, of a lot on the N. W. corner of Locust and Juniper streets, 110 feet on Locust street by 185 feet in depth. [Examiner's Report, pages 142, 143.]





Mr. Williams testifies (page 207, Examiner's Report) that about the second day after the interview with Messrs. Wharton and Biddle, when he was seated by Dr. Rush's bed side, the Dr. turned and said, "Harry, now you will promise me to put the building on that lot." I said, "Certainly, Doctor, if you desire it, I will promise you that I will put it there, and nowhere else." The doctor merely expressed his satisfaction.

At a meeting of the Directors of the Library Company, held June 3, 1869, (pages 112 and 193, Examiner's Report), Mr. Williams, an executor, laid on the table a certified copy of the will of the late Dr. James Rush, and requested that the Board would take immediate steps to ascertain the decision of the Library Company upon the question of accepting the devises and bequests contained in Dr. Rush's will, on the conditions therein expressed. To consider this question a special meeting of the Library Company (that is of the stockholders) was called for the 29th day of June, 1869, at 12 M., and Messrs. Hare, McCall, and Wharton were appointed a committee to examine the will of Dr. Rush, and report upon the legal and other points involved in accepting the trust therein created, and to report at an adjourned meeting of the Board to be held on Thursday the 10th June, 1869.

The meeting of the Directors on the 10th June, 1869, and subsequent adjourned meetings, the proceedings at which are reported on pages 113, 119, and 193 *b* of the Examiner's Report developed a great difference of opinion between the executor and some of the Directors as to the expediency of accepting the devise clogged with the conditions and regulations which the testator had enjoined.

These differences of opinion manifested themselves also at the stockholder's meetings, (Ex. Rep., p. 119, 120, 121.)

On the one side it was maintained that the munificence of the gift ought to quiet all cavils as to the singularity of some of the provisions of the will, if singularity there was, which this side did not admit, and that the site should be accepted without hesitation. The majority of the Directors, and a large



body of the shareholders were of a different opinion, and wanted time to consider and weigh the pros and cons, and to afford an opportunity of advising with Mr. Williams about the site for the building. Unfortunately, at the outset a misunderstanding as to Mr. Williams' wishes with regard to the action of the Board as to the disposal of certain articles of personal property not mentioned in the will, but verbally to Mr. Williams, caused an estrangement and a sense of ill-treatment on the part of the executor.

How he regarded what took place appears from the closing paragraphs of his letter of December 30th, 1870, addressed to Dr. Charles Willing, (printed at large as Exhibit B, on page 29 of the Answer, and on page 44 of this report), and by his testimony, page 210, Examiner's Report, and his letter to Mr. Whitman, page 157, Examiner's Report. The impression made upon the Directors is testified to by Mr. Wharton, page 25, Mr. Cramond, page 58, Judge Hare, page 66, Dr. Norris, page 68, Mr. Lewis, page 69, Mr. McCall, page 90, Mr. Whitman, page 48, Dr. Willing, page 54, Mr. Biddle page 221, and the minutes of the meeting of the Directors, January 5th, 1871, Ex. Rep., page 156, Exhibit No. 18 e. The letter of Mr. Whitman, Sec., to Mr. Williams, Exhibit No. 38, page 156, Ex. Rep., and Mr. Williams' answer, page 157 of Ex. Report. There was evidently a misunderstanding.

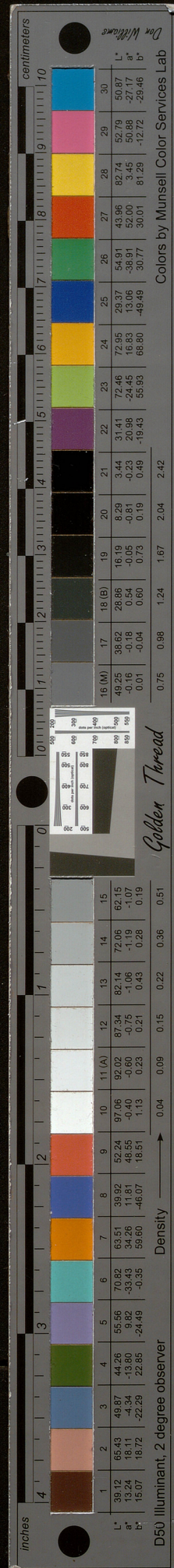
The master is of opinion that this controversy, though to be regretted, has really no bearing on the questions raised by the pleadings.

At a meeting of the Directors of the Library Company, held December 10th, 1870, the following proceedings are recorded.

EXHIBIT No. 17. Page 151 Examiner's Report.

[At a meeting of the directors, Dec. 10th, 1870,]

The Committee on the Rush Legacy, appointed June 3d, 1869, reported that in accordance with the resolution of the Board, June 9th, 1870, the counsel of the Company had pre-





pared and presented to the Court of Common Pleas a memorial praying for amendments to the charter of the Company, and that the said court had duly approved of the amendments submitted, and that the same now constitute part of the charter of the Company as required by the will of Dr. Rush, whereupon the following resolution was adopted :

*Resolved*, That the Secretary be directed to inform Henry J. Williams, Esq., the executor of the will of Dr. Rush, of the amendments of the charter of the Company, and to notify him that the Company are now ready to undertake the performance of their duties as Trustees for the Ridgway Branch of the Library.

The following preamble and resolutions were further adopted :

*Whereas*, At a meeting of the members of the Library Company held on the 29th day of June, 1869, Mr. Williams, as Executor of Dr. Rush, expressed an intention of erecting the Library Building contemplated by the provisions of the said will, on the square of ground on the corner of Broad and Christian Streets in this city.

*Now further Resolved*, That it is the opinion of the Directors of this Company, that the removal of their collection of books to the site thus proposed, would under the circumstances, be destructive of the interests of the Library and contrary to the wishes of a vast majority of the Stockholders.

*Resolved*, That the Directors take this, as the first opportunity since the Company has been authorized by law to accept the trusts of Dr. Rush's will, to express to Mr. Williams their earnest hope and request that he will reconsider his said intention of building on the site named.

*Resolved*, That Dr. Willing, Judge Hare, and Mr. Lea be appointed a committee to communicate these resolutions to Mr. Williams and to confer with him on the subject.

*It was further Resolved*, That the counsel of the Company be consulted with regard to the present rights and duties of the



Library Company of Philadelphia as Trustees for the Ridgway Branch of the Library.

Whereupon the following correspondence occurred:—

(Examiner's Report, p. 153.)

EXHIBIT No. 33.

*Letter from Mr. Whitman to Mr. Williams, enclosing copy of petition to Common Pleas.*

LIBRARY COMPANY OF PHILADELPHIA,

Fifth Street, below Chestnut,

*Philadelphia, Dec. 12, 1870.*

HENRY J. WILLIAMS, Esq.

MY DEAR SIR:—I have been directed by the Directors of the Library to transmit to you the enclosed copy of the petition to the Court of Common Pleas, the resolutions of the company at a meeting held on the 25th May last, the resolution of the Directors passed on June 9, 1870, and the decree of the Court on the above-mentioned petition.

Yours, very respectfully,

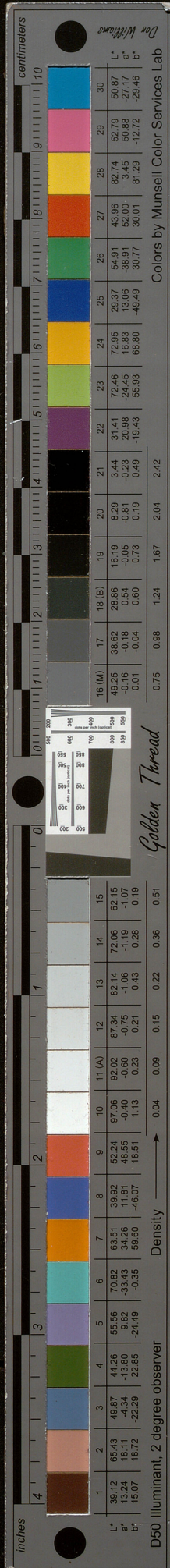
W. E. WHITMAN,

*Sec'y Philada. Library Co.*

EXHIBIT No. 36. Ex'r Rep. p. 154.

MY DEAR SIR:—I acknowledge the receipt of your note of the 12th inst., enclosing a copy of the petition of the Library Company to the Court of Common Pleas and their decree thereon.

As I understand the will of Dr. Rush, the trusts for the benefit of the Library Company only arise when the building is completed and ready to be delivered to them. At that time the question of their compliance with the conditions prescribed by the testator's will, will have been carefully considered and determined.





Until then his executor does not think it either necessary or proper for him to form or express any opinion in relation to the course pursued by the company, to which he has always been designedly a stranger.

I trouble you with this solely to prevent my silence from being considered as an assent to or approval of the petition or decree.

Very respectfully, &c.,

HENRY J. WILLIAMS.

WILLIAM E. WHITMAN, Esq.,

*Secretary P. L. Co.*

December 21, 1870.

EXHIBIT No. 34. Ex'r Rep. p. 153.

*Letter of Dr. Charles Willing, of Dec. 13, 1870.*

*916 Spruce Street, December 13, 1870.*

DEAR SIR:—I take this opportunity of enclosing a copy of resolutions passed by the Board of Directors of the Philadelphia Library Company, and to ask when it will suit your convenience to give the committee an interview to confer with you upon the subject to which they refer.

I remain with great respect, &c.,

CHARLES WILLING.

HENRY J. WILLIAMS, Esq.,

712 Walnut Street.

EXHIBIT No. 35. Ex'r Rep. p. 154.

*Letter of Mr. Williams to Dr. Willing.*

MY DEAR SIR:—

I shall be happy to meet the gentlemen named in your note either as a committee or as individuals, but I must say that I feel it impossible to make any change in the location of the



Library upon the lot selected by Dr. Rush himself. It seems to me a sacred duty to carry out the clearly and repeatedly expressed wishes of the testator, and to perform what he undoubtedly understood to be a fundamental condition of his bequest. I moreover fully believe that, a few years hence, the position selected by him for his Library Building will be in all respects admirably suited to the objects the Doctor had in view, and which he has expressed in his will.

I shall be in town on Monday, and will meet the Committee, if they desire it, at one o'clock, on that day, or on any other Monday they may name. I mention the hour and the day only to save trouble, and will accommodate myself to their wishes. If my office, 712 Walnut street, is more convenient, I will be happy to see them there, or at any other place they may name. With sentiments of great esteem and regard, believe me, &c.

HENRY J. WILLIAMS.

DR. CH. WILLING.

December 17, 1870.

EXHIBIT No. 37. Ex'r Rep. p. 155.

*Letter of Dr. Charles Willing of December 22, 1870.*

916 SPRUCE STREET, December 22, 1870.

MY DEAR SIR:—

In enclosing the reply of the Committee to your note of the 17th, I would desire to say that the Committee regards that note as your formal reply to the resolutions of the Board of Directors. If this is not in accordance with your intention in writing that note, pray address another to the Committee which may replace the former one.

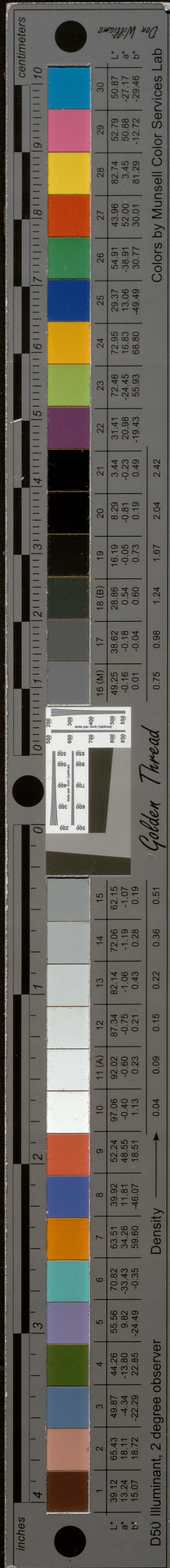
I remain with great respect, &c.,

(Signed)

CHAS. WILLING.

HENRY J. WILLIAMS, Esq.,

712 Walnut Street.





## EXHIBIT B. Page 29, Answer.

CHESTNUT HILL, Dec. 30, 1870.

MY DEAR DOCTOR: I did not intend my note of the 17th instant to be a formal reply to the resolutions of the directors of the Library Company, nor to prevent the committee from having the conference they requested. So far from it, that I mentioned both time and place at which I would have been happy to meet them. I cannot, however, conceal my conviction, that nothing they could say would change my intention of placing the Ridgway Branch of the Philadelphia Library on the lot purchased by Dr. Rush for its site; and after all that has take place, I must confess I am a little surprised that they should again ask me to do so. Judge Hare and yourself must both be fully aware (for I have stated them, I believe, both orally and in writing) of the circumstances connected with the selection of that lot for this purpose; but, as Mr. Lea, one of your committee, is a new member, I shall repeat them, even at the risk of being unnecessarily tedious in my answer; for I cannot believe the directors could expect *me* to make the change they desire, if they fully appreciated my position.

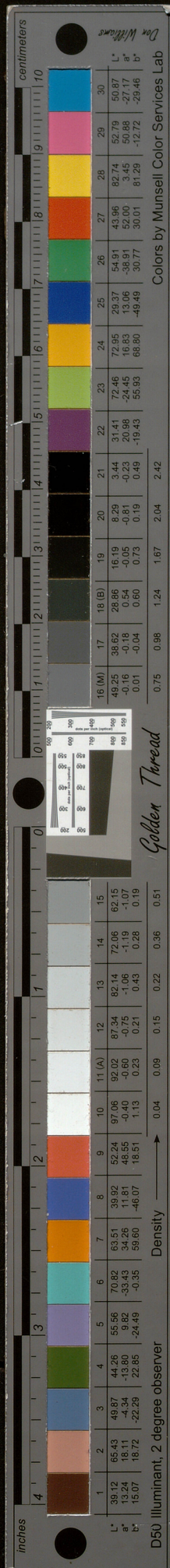
Some weeks before Dr. Rush's death he was very anxious to have the location of the intended building finally fixed and settled; and he desired me to ascertain the size and cost of all the vacant lots on Broad Street, on which street he desired it to be placed. I procured statements of the sizes and prices of all I thought at all suitable, from Vine to South Street, but he was satisfied with none of them. Another gentleman brought him a plan of the lot on Christian Street, and he was so much pleased with it that he directed me to buy it at once. I did so; and when the contract was signed and a part of the consideration paid, he expressed great pleasure that it was concluded, as it relieved his mind from all anxiety. Some days after, he recurred again to this subject, as it had probably occurred to



him that he had given me an absolute discretion as to the situation of the library by the terms of his will, and that I might be induced to overrule his decision after he was gone. He called me to his bedside and asked me to give him a promise that I would *build the library on that lot and nowhere else*. I gave him this promise as fully and solemnly as language could express it, and he then thanked me and said he could now die in peace. Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the management of his whole estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so, were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?

And what is the reason assigned why I should do this?—"to gratify the wishes of the shareholders." But have these shareholders shown such an appreciation of the magnificent gift of Dr. Rush (which is only subject to their future acceptance) as to render his representative very desirous to comply with their wishes, in opposition to the repeatedly and earnestly declared intentions of Dr. Rush, and to his own deliberate judgment? When the question was first presented to them, these shareholders, by a majority of five, accepted his bequest, but, by a very much larger majority, refused to pass a resolution expressing their gratitude for his gift. True, at a subsequent meeting they adopted such a resolution, but it was only on second thoughts; and it may be doubted whether it was not agreed to because of the extraordinary position in which they would be placed, if they were to take his money and refuse to admit they were obliged to him.

I have said that to assent to the wishes of the shareholders would be in opposition to my own deliberate judgment, and I mean this in its fullest extent. I think that, considering its size, its price, and the description of library Dr. Rush intended





to endow, there is not an attainable position on Broad Street, of sufficient size to meet his views, which is preferable to the one he has himself selected.

There is one other matter to which I refer rather unwillingly, but as I shall not probably have any further communication with the directors on this subject, I have determined to mention it.

During the three or four weeks previous to Dr. Rush's death, he desired me on various occasions to make pencil memoranda of several articles which he directed me to give to his friends as remembrances. I reduced these memoranda to form; wrote them in ink, and read them over to him in presence of Miss Little, a friend who was constantly with him. They were not signed because his physical weakness rendered his writing a labor, and he did not wish his tremulous signatures to be attached to his will. I said to him no one could object to them but the Library Company, and if they gave their assent, however informally, I would assume the pecuniary responsibility and carry out his instructions. I mentioned all these facts to the directors, at one of the only two meetings I have attended since Dr. Rush's death, and stated the value of those articles would not exceed \$2000—and several were intended for me, but I declined to take any of them, and spoke only for the sake of others.

No notice was taken of this request, and after waiting many months I consulted my counsel whether I might not consider these memoranda as part of Dr. Rush's will and carry them into effect.

They both advised me strongly against it, and I was obliged to inform the intended beneficiaries, that for want of the assent of the Library Company, they could not have their remembrances.

Now, the Library Company give me notice that the company "are now ready to undertake the performance of their duties as trustees for the Ridgway Branch of the Library,"—*duties* and *trusts* which I understand commence only when the build-



ing is finished; but I am not aware that they have shown, in any one instance, a disposition to comply with the last instructions of one whom I shall always consider as their munificent benefactor.

Very truly yours,

H. J. WILLIAMS.

DR. CH. WILLING,

*Chairman.*

EXHIBIT No. 18e.

[At a meeting of the Directors, January 5, 1871.]

The letter of Mr. Williams to Dr. Willing, of December 30, 1870, was read. Prout the same, printed in defendant's answer, p. 29.

"The Committee was then discharged, but the Board considering that the latter part of Mr. Williams' letter should receive some immediate reply, instructed the Secretary to inform Mr. Williams that the members of the Board, as far as in their power, were ready to give their consent to carrying out the wishes of Dr. Rush, as expressed in the unsigned papers referred to in Mr. Williams' letter, of which they have now for the first time heard, in such way as counsel should advise; and that they would have expressed their consent previously, had they been sufficiently acquainted with the facts mentioned by Mr. Williams."

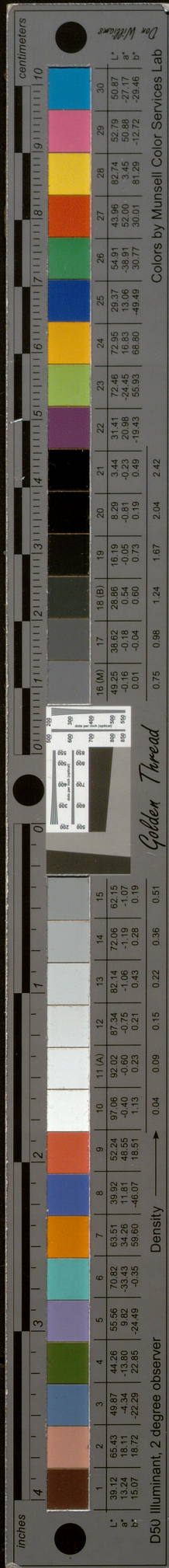
EXHIBIT No. 38. Ex'r Rep. p. 156.

*Letter of Wm. E. Whitman of January 12, 1871.*

PHILADELPHIA, January 12, 1871.

HENRY J. WILLIAMS, Esq.:—

DEAR SIR:—Your letter of December 30, addressed to the Chairman of our Committee, Dr. Willing, was laid before the Board of Directors of the Library, at their meeting on the 5th inst.





I am requested by the Directors to express to you the regret with which they have learned from your letter of the 30th ult. that there has been any misunderstanding about the effects which Dr. Rush desired to be disposed of in the manner you mention.

The impression on the minds of the Directors was that you did intend to follow out the wishes of Dr. Rush in relation to those articles, and that your allusion to the subject was a notice that you would do so.

As you desire some formal action of the Board, I am directed to say that they are ready to give their consent in such manner as counsel may advise, and that they would have expressed this readiness sooner had they been advised of the facts.

I am, sir, very respectfully yours,

W. E. WHITMAN,

*Secretary Library Co. of Philadelphia.*

EXHIBIT No. 39. Ex'r Rep. p. 157.

*Letter of Mr. Williams to Mr. Whitman.*

MY DEAR SIR:--

You are under a misapprehension in saying in your note of the 12th inst. that I desired some formal action of the Board in relation to the fulfilment of the verbal directions of Dr. Rush, as to the remembrances to be given to his friends. I certainly did not ask for it in my letter of the 30th Dec. 1870, nor do I at all desire it at this late day. It would have been at the time of Dr. Rush's death most gladly received, and I supposed that upon simply stating, which I am sure I did very distinctly, that it only required the approval of the Board to enable me to comply with his wishes, that approval would have been cordially and instantly given. I know I waited for it long and anxiously, and was exceedingly surprised and disappointed at not obtaining it. I never imagined that the Board intended to leave me to bear not only the *pecuniary* but also the *moral*



responsibility of disposing of his effects, of which they were to be ultimately the residuary legatees, when they perfectly well knew I had no legal right to do so. Their assent, without releasing from the former, which I was aware was not in their power, would have relieved me from the latter, which I did not choose to assume.

I do not see what construction I could put upon their silence, except that they declined acceding to my request, nor do I know how I could have "advised them of the facts" more fully than I had done by my statement at the Board.

Under these circumstances, I informed Dr. Rush's family that, although I could not carry out his instructions as he designed, yet I could dispose of these articles at private sale, and that they could have all or any of them at their appraised values. Some of them accepted this offer, and have received and paid for their intended gifts—others declined it.

The matter has thus been settled for about a year, and I not only do not desire, but I am entirely unwilling, to disturb it. It must rest as it is. I have, however, the consolation of knowing that it was not from any omission of mine that Dr. Rush's kind intentions have been frustrated.

My object in referring to this subject in my last letter was only to inform the Board of the course which the want of action on their part, formal or informal, had compelled me to pursue.

Very truly and respectfully,

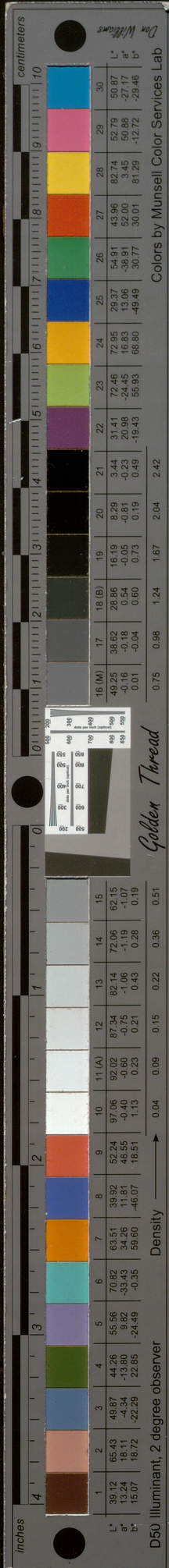
HENRY J. WILLIAMS.

W. E. WHITMAN, Esq., *Secretary*.

CHESTNUT HILL, January 16, 1871.

On the 19th of October, 1869, the stockholders at a meeting convened for that purpose agreed to the following resolution:

*Resolved*, That the Stockholders of the Library Company of Philadelphia do hereby accept the legacy of Dr. James Rush, according to the terms expressed in his will.





And the following proceedings were had :

Hon. J. Ross Snowden offered the following resolutions :—

*Whereas*, A majority of the Stockholders of the Library Company of Philadelphia has accepted, by a stock-vote, on the 19th inst., the legacy of the late Dr. James Rush, according to the terms expressed in his will ; therefore

*Resolved*, That the resolution adopted by the said vote be entered on the minutes of the Library Company as the acceptance by said Company of the munificent and philanthropic bequest of Dr. Rush.

*Resolved*, That a Committee, to consist of three Stockholders and three Directors, be appointed to co-operate with the Executor of Dr. Rush in carrying into effect the provisions of said will.

*Resolved*, That the early construction of a fire-proof building to contain the valuable books, papers, and other treasures of the Company, as well as those which shall hereafter be obtained, is an object of the highest importance and demands the earnest and immediate attention of the Company and of the Executor of Dr. Rush.

*Resolved*, That a copy of the resolution adopted by a vote of the Stockholders, together with those preceding, be sent to Henry J. Williams, Esq., the Executor of Dr. Rush.

These resolutions were put to the vote and lost.

The following, offered by Mr. Fraley, was then adopted :—

*Resolved*, That the further consideration of the bequest of Dr. James Rush be postponed, and that a committee, consisting of five members and the Directors, be appointed, who shall take the subject into consideration and shall recommend to the members, at a meeting to be called by the Directors, such action as they may deem expedient or necessary.

The chairman appointed on behalf of the Stockholders, Frederick Fraley, Henry M. Phillips, Edward King, James S. Biddle, and J. Dickinson Logan.



## EXHIBIT No. 8.

[Meeting of the Directors, January 6, 1870.]

"A letter from Henry J. Williams, Esq., having been read, tendering his resignation as a member of this Board, the following resolutions were unanimously agreed to:--

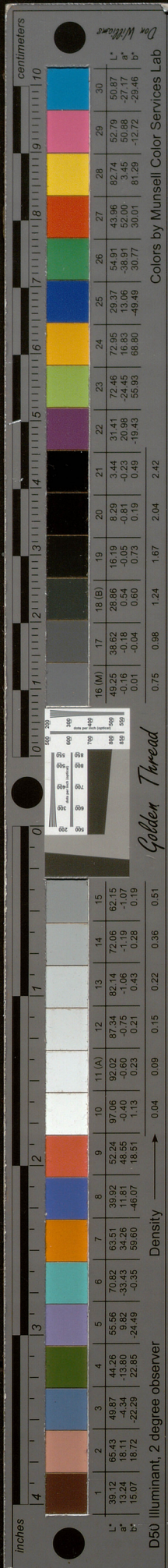
"*Resolved*, That the Board have heard with great regret Mr. Williams' intention of resigning, and that in view of their great esteem and regard for him, and from their grateful remembrance of the highly important and valuable services he has rendered to the institution, they desire that he will reconsider his purpose of leaving the Board with which he has been so long associated, and gratify them by withdrawing his letter of resignation.

"*Resolved*, That the Secretary communicate the above to Mr. Williams."

## EXHIBIT No. 30.

*Mr. Williams to Mr. Whitman.*

MY DEAR MR. WHITMAN:—I have received the resolution of the Board of Directors of the Philadelphia Library Company, which you were good enough to send me, and beg leave to express my grateful thanks for the kind expressions it contains. I came to the conclusion that it would be better for me to leave the Board, after careful and deliberate consideration, and I still adhere to that opinion. There are so many doubts, differences, and difficulties among the members, in relation to the bequest of Dr. Rush, its extent, construction, and value, that my presence would only render discussion embarrassing to the Board, and therefore far from agreeable to myself; besides, I learn from the public prints that the shareholders rejected a resolution directing a copy of their acceptance of Dr. Rush's bequest, with an acknowledgment of their high appre-





ciation of the confidence he had reposed in them, and of their cordial willingness to carry out, in the most beneficial way, his philanthropic intentions, to be communicated to his executor.

Now, I do not think it desirable for me to retain a seat at the Board as the representative of those shareholders, and I must, therefore, repeat my request that my resignation may be accepted.

I beg you to convey to the Board my best wishes for the prosperity of the library, and for the welfare and happiness of every individual member.

Very truly yours,

HENRY J. WILLIAMS.

WM. E. WHITMAN, Esq.,

*Secretary.*

January 11, 1870.

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A great deal of testimony was given before the Examiner, and much was said in argument before the Master, on the question whether Mr. Williams was or was not present when a certain report made by Messrs. Hare, McCall and Wharton was read to the Board, June 10, 1869. The report is Exhibit No. 43, and is printed on page 193*b*—Examiner's Report. The Master is of opinion, from the evidence, that Mr. Williams was present at the meeting in question, but did not hear the report read, probably had gone before reading. As a matter of fact it has little, if any, bearing on the questions in issue.

The letter of Mr. Williams to Dr. Willing of Dec. 30th, 1870, in which he expresses the determination to build on the lot at Broad and Christian Streets, and "nowhere else," according to his "promise" given to Dr. Rush "as fully and solemnly as language could express it," seems to have determined the complainants to file the bill in this case.

The theory of the bill is, that the plaintiffs have an interest in the nature of property in the discretion to be exercised by

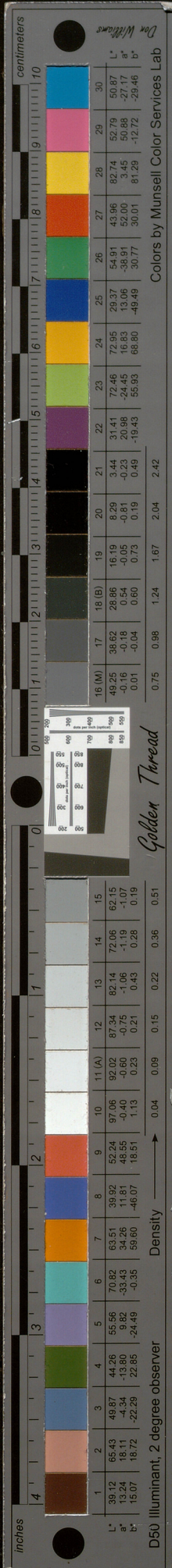


Mr. Williams, whether the will is regarded simply as a devise to them in trust for themselves and others or whether it is held to create a charity of which they are to be the trustees.

In either case, when the building is completed and conveyed to them, it is to be used to contain their books, as well those which they now own, either in their own right or in trust, as those which may be acquired from the estate given by the will. That the discretion as to the site, being in its nature capable of exercise in a way which would make it impossible for them to accept, their interest is a contingent one depending on the site being such as they can accept.

That while it is true, they can only enjoy the property, or exercise the trust on the terms which the testator has imposed, that is subject to the *discretion* of the executor, as to the site and character of the building to be erected, they are equitably entitled to the exercise of his untrammelled discretion. That if he has committed himself beforehand to any particular site, whether that commitment has followed from unworthy or from the purest motives, from bribery, by a person having a lot to dispose of, or from a promise made to a munificent testator, it is equally in equity a fraud on the trust. That in the view of equity, no one avowedly so committed is in a position to exercise a discretion, such as is confided to the defendant by the following words in the second paragraph of the second or additional codicil, to wit:

"Second. I have in my will limited the extent of the lot to  
 "be purchased for the Library Building, as well as its locality;  
 "but as I desire that it shall have not only strength, durability,  
 "and accommodation, but also be of sufficient magnitude for  
 "any future or contingent, but not an ambitious or competing  
 "increase of the Library, in order to prevent, if possible, its  
 "being torn down in twenty years, and the lot sold at a speculative profit to suit the hyperbole of the times, *I authorize*  
 "*and allow my executor, under a broad and thoughtful foresight,*  
 "*to increase the size of the lot, and select any situation he may*





*"deem most expedient without regard to any provision of my Will or Codicils."\**

These are the principles which the complainants seek to have enforced by the I., II., IV., and VII. prayers for relief.

The III., V., VI., prayers cannot be considered as before the master; they were not discussed before him.

The defendant denies that it is the duty of complainants, and avers that they have no right to apply to this Court for relief, and demurs to so much of the bill as charges such right and duty, and to the whole of the relief prayed for, and assigns as causes of demurrer :

"I. There has been as yet no valid acceptance of the bequests of the will. There can be no binding agreement to accept them until after the entire completion of the building. Dr. Rush gives no estate to complainants until after such completion. The alleged acceptance of the fifth of October, 1869, is not binding upon them or their successors, but is a simple expression of willingness to receive a gift, and is revocable until receipt of a conveyance.

II. None of the preliminary conditions prescribed by testator have been complied with.

a. No binding agreement to comply with these has ever been executed and delivered. This is made a condition precedent to the vesting of any estate or right.

b. The clauses (see p. 3 of this answer) which the testator ordered to be inserted in an Act of Assembly, have not been

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\* The will gave the whole estate to Henry J. Williams, his heirs and assigns, to be held by him for and upon the following trusts and purposes, and upon no other use, trust or purpose whatsoever. In trust, \* \* \* In trust, to select and purchase a lot of ground not less than one hundred and fifty feet square, situate between Fourth and Fifteenth Streets, and Spruce and Race Streets, in the City of Philadelphia, and thereon to erect a fire proof building, sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia, whose library is now at the corner of Fifth and Library Streets.



inserted in the one drafted by the counsel of the company, nor in any other.

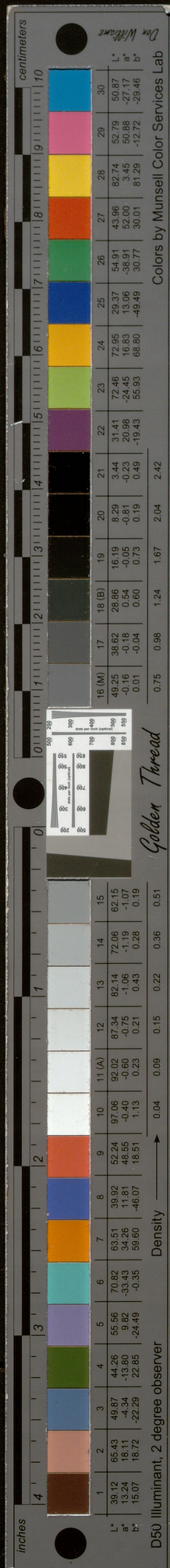
c. The Act of Assembly drafted by complainants virtually prohibits them from acting as trustees under Dr. Rush's will, because it enacts that their property, books, &c., shall not be subject to the conditions of that will, but shall remain entirely under their own absolute control.

d. The order of the Court by which they have sought to dispense with what the testator prescribed, is in direct opposition to the Act of Assembly by which it is pretended to have been authorized. The Act permitted the company to act as trustees "only in such manner that the real and personal property of "the company, held by them in their own right," should be in no wise affected by Dr. Rush's will and codicils, "but should "remain and be under their own entire and exclusive control "and disposition." The order of Court attempts to interfere with this control and disposition, by saying who shall act as directors, and the number of stockholders who shall use it, and by forbidding a connection with any other body corporate or politic. It is therefore utterly null.

e. The reservation of an exclusive control in the Library Company over their books, &c., is in opposition to the condition imposed by testator, that there must be no non-exclusion of books differing from "ordinary or conventional opinions."

f. The reservation of this control will prevent the complainants from binding themselves to use the building for the purposes of their library, and as a receptacle for their books. Without a compliance with these conditions, there can never be any conveyance or delivery.

g. The order only provides that "so long" as the Library Company shall act as such trustees, they shall do so under the conditions imposed by Dr. Rush's will; but I am advised that I have a right to insist that upon conveyance and delivery of the building they must bind themselves to a perpetual subjection to those limitations, as the consideration to be given for Dr. Rush's magnificent present.





III. The alleged acceptance has been withdrawn. By their acceptance on the twenty-fifth of May, 1870, of the said Act of Assembly, the complainants distinctly elected, as they allege, "not to allow their collection of books to be removed to the building to be erected by the defendant, if placed on the proposed site," and this election, so far as appears from the averments in their bill, was made in the belief that I was acting in entire accordance with the directions of the will, for they aver no knowledge until the receipt of my letter of the thirtieth of December, 1870, of my having made any, supposed to be disqualifying, promise. The purchase, in January, 1870, of the lot at Locust and Juniper Streets, with a view to erecting a library building thereon, in direct opposition to the provisions of the will, was also, it is charged, a withdrawal of their former acceptance.

IV. The complainants are not a charitable corporation, nor within the protection afforded to charities by courts of chancery.

V. The interference by the Court in favor of a *private* corporation, such as the complainants are, will be in prejudice of a great charity for the benefit of the *public*, which "the Ridgway Library" will be, if endowed under the provisions of Dr. Rush's will, in the event of the refusal or omission of the complainants to accept the devises in their favor.

VI. The Court has no jurisdiction to control my discretion in the selection of a site for the building, nor in the execution of any of the trusts of the will.

24. I pray that I may, under the provisions of the rule of Court in such cases made and provided, be permitted to avail myself of all matters of defence in law, or to the merits of the bill, in my above answer stated, of which I might have availed myself by demurrer, or plea in bar, with the same force and effect as though I had filed a separate demurrer or demurrers, plea or pleas in bar."



It becomes the duty of the Master to consider each of these grounds of demurrer, which he will do seriatim, and then consider the plaintiff's title to the relief prayed for in the I, II, IV, and VII prayers of the bill.

The first reason assigned for the demurrer the Master reports to be untenable.

The resolution reported by the committee on the 5th October, 1869, and approved at the stockholders' meeting on October 19, 1869, was in these words:

*Resolved*, That the stockholders of the Library Company of Philadelphia do hereby accept the legacy of Dr. James Rush, according to the terms expressed in his will, (pages 129 and 140, Examiner's Report,) page 49 of this report.

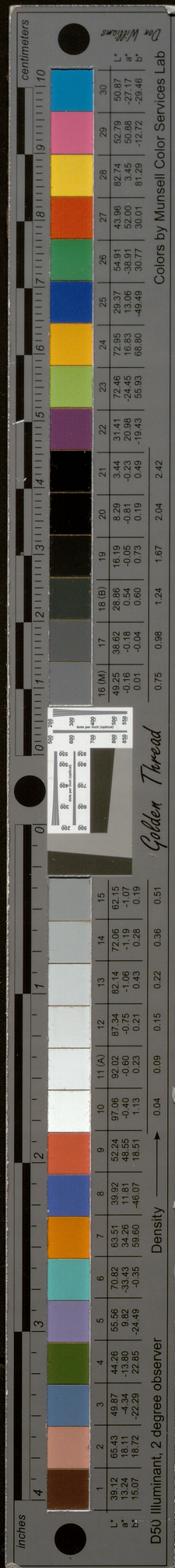
The building will not, under any circumstances, come into their possession, nor will their active duties as trustees begin until the building is completed and deeded to them.

But their resolution to accept the legacy, "according to the terms expressed in the will," together with the steps taken to put themselves in position to accept the deed, the Master is of opinion, give them a standing to invoke the authority of this Court for the protection of their rights and the due enforcement of the trust. (See this report on the prayers of the bill.)

As to the second ground of demurrer, viz.: "None of the preliminary conditions prescribed by testator have been complied with."

As to subdivision "a," to wit: "No binding agreement to comply with these has ever been executed and delivered; this is made a condition precedent to the vesting of any estate or right," the Master is of opinion that the demurrer is not well founded.

The will provides that *before any conveyance* is made to the Library Company they shall, either by an alteration in their charter or in some other way satisfactory to the executor, bind themselves to conform to and comply with certain conditions expressed in the will and codicils. The company has procured an Act of Assembly (Exhibit No. 14, This Re-





port, page 8), and certain amendments to their charter (Exhibit No. 16, This Report, pages 10, 11). The executor, by his letter to the Library Company, dated December twenty-first, 1870 (this Rep., pp. 41, 42), acknowledging the receipt of a copy of the proposed amendments writes. "As I understand the will of Dr. Rush, the trusts for the benefit of the Library Company only arise when the building is completed, ready to be delivered to them. At that time the question of their compliance with the conditions prescribed by the testator's will, will have been carefully considered and determined; until then the executor does not think it either necessary or proper for him to form or express any opinion in relation to the course pursued by the company to which he has always been designedly a stranger."

If the Master is right in the view he has expressed of the first ground of demurrer, the same argument must suffice to defeat that now under consideration. The complainants have done what they could. If the executor is right in saying, as he probably is, that he is not bound to say whether the conditions have been complied with satisfactorily to him until he comes to make the conveyance, that does not lessen the prospective interest of the complainants either as trustees or *cestui que trusts*, which is sufficient to enable them to intervene for the protection of the property against what may be the illegal or inequitable action of the Trustee.

As to subdivision "b," of the second ground of demurrer, viz.: "The clauses which the testator ordered to be inserted in an Act of Assembly have not been inserted in the one drafted by the counsel of the company, nor in any other,"

The Master is of opinion that the testator cannot be held to have meant by the language used in the second paragraph of the first codicil that an Act of Assembly must be used, whether necessary or not, to carry out the provisions of the will and codicils, or that the Act of Assembly used must necessarily enumerate *totidem verbis* all the alterations contemplated.

The Act of 23d February, 1870, authorizing the Library Com-

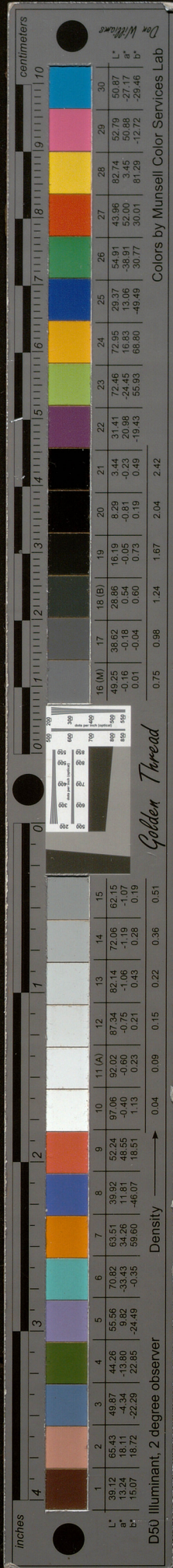


pany to accept the trust and empowering them, after acceptance of the Act, to apply from time to time to the Court of Common Pleas for the City and County of Philadelphia, "for such further amendments to the charter of the company as may be necessary to carry into effect the conditions and provisions of the will and codicils in accordance with the directions of this Act," followed by an application to the Court of Common Pleas setting out the amendments required according to the terms of the will, approved by the court, is the same in effect as if the amendments had been each inserted in the Act of Assembly, and is a sufficient compliance with the provisions of the will.

Sub-divisions c, d, e, and f, of the second ground of demurrer, the Master thinks are not sustained. These several subdivisions are based on the same idea, viz.: that there is something in Dr. Rush's will which deprives the Library Company of its own property, and, therefore, makes inconsistent with the acceptance of the trust the provision of the Act of Assembly declaring that their own property shall remain "under their entire and exclusive control and disposition." The Master does not so read the will. He is of opinion that the Act of Assembly, so far as this is concerned, declares only what the law would have declared had nothing been said on the subject.

By the *will*, the building, when completed, is to be conveyed to the Library Company, "for the uses and purposes of their library, *and for no other use and purpose whatever*," "provided they bind themselves, either by an alteration in their charter, or in some other way satisfactory to the executor, not to permit lectures, &c., &c., on the lot of ground, or in the building, or the formation of any museum thereon or therein, or expend any of the funds derived from him in defraying the expenses of such therein or thereon. The accounts of the receipts and expenditures of the estates derived from him, are to be kept separate and distinct from all other accounts of "The Ridgway Branch of the Library Company of Philadelphia."

There is nothing in all this which assumes any control over the property of the Company.





The first codicil adds to the uses and purposes for which the property was to be conveyed, that of a "monument," and directs the executor to have inserted in the Act of Assembly which will be required clauses enacting:—That not more than one-fourth of the directors shall belong to any one of the three learned professions; that the number of shares in the library shall be limited to those actually issued at the time of testators death; that the library shall not connect themselves with any other body, corporate, or politic; and that no part of the funds of the Ridgway Branch of the Philadelphia Library shall ever be used or expended in providing refreshments, &c. All these may be agreed to without the Library Company surrendering their control over their own property.

The declaration in this codicil, that the testator does not wish any work excluded from the Library on account of its difference from ordinary or conventional opinions, relied upon in subdivision "e," is an expression of a wish merely, and must, in the nature of things, be left, as to its execution, to the good sense of the trustees.

This codicil, in its sixth clause, changes the will in that part of it which forbids museums, or collections of paintings to be kept in the building. By this section the testator requires a room to be set apart in the new building, in which to keep all his pictures, his private library, his manuscripts, copyrights and papers, and those of his father, Dr. Benjamin Rush.

In the fourth section of the additional or second codicil, the testator uses this language: "In order to insure, as far as is in my power, the application of the various devises and bequests, which I have made for the use and benefit of the Library Company, in accordance with my wishes and directions, I hereby devise, direct, will and declare, that the whole and every part of my estate, real and personal, given or devised for the use and benefit of the said Library Company, and all the books and furniture purchased by them, with the income and proceeds thereof, shall be taken and held by them (whenever the same, by the provisions of my will, or of any codicil thereto, shall come



into their possession, and become subject to their control), as trustees for the uses, objects, trusts and purposes in my said will, and any codicil thereto mentioned and expressed."

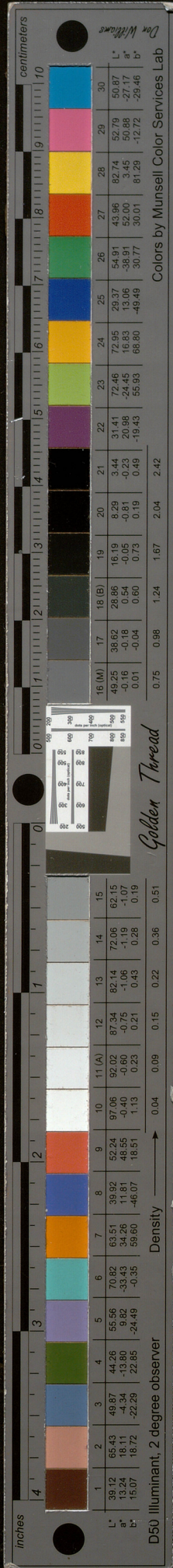
It is not sought to extend the trust, or to interfere with or control the property of the Library Company; and with this agrees the opinion of Judge Strong, fifth paragraph, part of Exhibit No. 23, page 116, Examiner's report, viz.:

"5. The plan of Dr. Rush was to establish a branch of the Philadelphia Library, not to extinguish it, or to merge its existence in a new institution. It is not, I think, made a condition of the devise to the Company, that they shall not retain their present building or procure some other for the convenience of the members, and for the reception of such books as are intended to be excluded from the branch Library. Of course such other building cannot be placed upon the lot upon which the building for the *branch* shall be erected; nor can the funds derived from Dr. Rush's estate be appropriated for any other purposes than those specified in his will. They can not be used for the purchase or erection of such other building, or for the purchase of such books, or for the current expenses of that part of the Library of the Company."

Subdivision g of the II ground of demurrer, the master thinks unsound.

The will in the fourth clause of the second codicil assumes, that a case may arise for a change of trustees. The law of Pennsylvania always contemplates such a possibility, and there certainly is nothing in the will of Dr. Rush to warrant the conclusion that he wished to interfere with, or control the Library Company, except while they were acting as his trustees, or enjoying his property. If they ceased to be trustees, or to enjoy the property, there is nothing in the conditions required by Dr. Rush which would prevent the Company from again amending its charter in favor of the three learned professions, or in that point which relates to the number of its shares.

In fact the will contemplates the contingency of the Library





Company using the building, though they may refuse or be removed from the trust. In the fourth paragraph of the additional codicil he uses this language: If the Library Company shall in any respect violate, or omit to comply with any of the provisions, &c., therein contained, then I will and direct, that the Pennsylvania Company for Insurance on Lives, &c., shall and may, or if they omit, any Citizen of Philadelphia may apply to the proper Courts of the Commonwealth, to compel the Library Company to comply, or remove them from the trust "and transfer the whole real and personal estate aforesaid, including the Library Buildings, and all the books and furniture belonging to the Ridgway Branch of the Philadelphia Library, unto the said Pennsylvania Company, or if they shall refuse, to some other trust company of the city, who shall take and hold the whole of the said estates, &c., &c., &c. ; *permitting, however, if in their sole discretion they shall think proper so to do, but not otherwise*, the said Philadelphia Library Company to occupy the Library Building, and to take charge of the books, &c., of the Ridgway Branch thereof, provided they shall do so under the absolute direction and control of the new trustees, who shall strictly supervise, and entirely control and direct, all the expenditures of my estate in relation thereto, and who may at any time remove them from the said charge, if the Library Company shall not submit and conform to such control and direction."

As to the III. general ground of demurrer, to wit:

"III. The alleged acceptance has been withdrawn. By their "acceptance on the twenty-fifth of May, 1870, of the said Act "of Assembly, the complainants distinctly elected, as they allege, 'not to allow this collection of books to be removed to "the building to be erected by the defendant, if placed on the "proposed site,' and this election, so far as appears from the "averments in their bill, was made in the belief that I was "acting in entire accordance with the directions of the will, for "they aver no knowledge until the receipt of my letter of the



"thirtieth of December, 1870, of my having made any supposed to be disqualifying promise. The purchase in January, 1870, of the lot at Locust and Juniper Streets, with a view of erecting a library building thereon, in direct opposition to the provisions of the will, was also, it is charged, a withdrawal of their former acceptance."

The master is of opinion and reports that this ground of demurrer is not sustained.

He finds no evidence that the acceptance has been withdrawn.

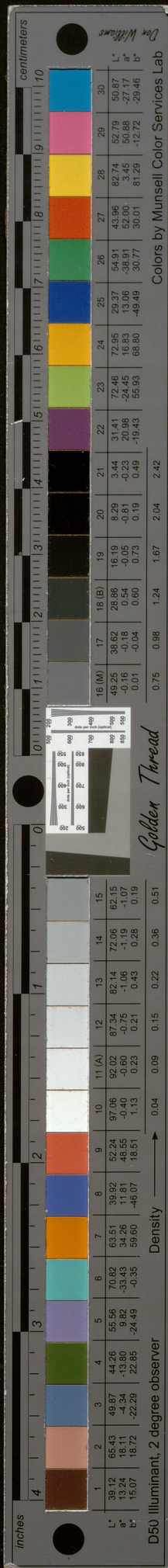
The acceptance is argumentatorily said to have been withdrawn, because the plaintiffs elected (page 23 of the bill) on the 25th May, 1870, "not to allow their collection of books to be removed to the building to be erected by the defendant, if placed on the proposed site," they at that date having no knowledge, according to the *averments* of their bill, of the defendant having made the disqualifying promise. The averment, however, is distinctly made in XXIV. section, page 16, of the bill, that the plaintiffs had this knowledge at and before the twenty-ninth day of June, 1869. The argument, therefore, fails.

The purchase in January, 1870, of the lot at Locust and Juniper Streets, with a view to erecting a library thereon, is not necessarily "in direct opposition to the provision of the will, and a withdrawal of their former acceptance, as alleged in this head of demurrer."

Why it is not, is shown in the answer to the II. head of demurrer.

The IV. ground of demurrer, namely, "The complainants are not a charitable corporation, nor within the protection afforded to charities by Courts of Chancery," raises a question intrinsically of great interest, though perhaps not material to this cause in its present shape.

The charter of "The Library Company of Philadelphia," as amended by the Act of 23d February, 1870 (pages 2, 8, 9, of this report, page 145 of the Examiner's report), expressly authorizes





the complainants "to act as trustees for the Ridgway Branch of the Philadelphia Library, and the trusts pertaining thereto, under the last will and codicils of James Rush," "without limitation as to the yearly value or income of said trust estate." The point in question, involving the proper exercise of the preliminary trust reposed in the defendant, comes within the jurisdiction of the Court under one of the ordinary heads of its jurisdiction, viz., the care of trust-moneys and property. This point was earnestly argued by the able counsel of the defendant. The master, therefore, feels it his duty to express his opinion, and it is that this ground of demurrer is not well taken.

It is not necessary to go over the whole law of charitable trusts, and trace the history of the jurisdiction exercised over them by Courts of Equity.

It has come to be admitted that they constituted one of the original subjects of equitable action, and that the statute 43 of Elizabeth regulated and defined, but did not confer the jurisdiction.

Since equity has been established in Pennsylvania, before perhaps, (*Witman vs. Lex*, 17 S. & R., 88) a like jurisdiction has been assumed in her Courts, and the law of charitable uses has undergone a most thorough and learned investigation. Though the statute 43 Elizabeth was never formally adopted or enacted (*McGill vs. Brown*; *Sarah Zane's Will*, *Brightley's Rep.*, 347; *Vidal vs. The Mayor*; *Girard's Will*, 2 Howard, 127; *Price vs. Maxwell*, 4 Casey, 23), the course of her legislation has shown that her jurisprudence was at one with that which influenced parliament in the enactment of the 43d of Elizabeth; indeed, that her idea of charitable uses had, if anything, taken a more extended range. The 4th section of the Act 6th April, 1791, authorizes corporations formed for any *literary*, charitable, or religious purpose, to acquire lands, &c., to be disposed of according to the objects for which the corporations were formed, or of the will and intention of the donors (3 Smith's Laws, 31), and the Act of January 6, 1821 (*Purd.* 145), declares "no disposition of property hereafter made for



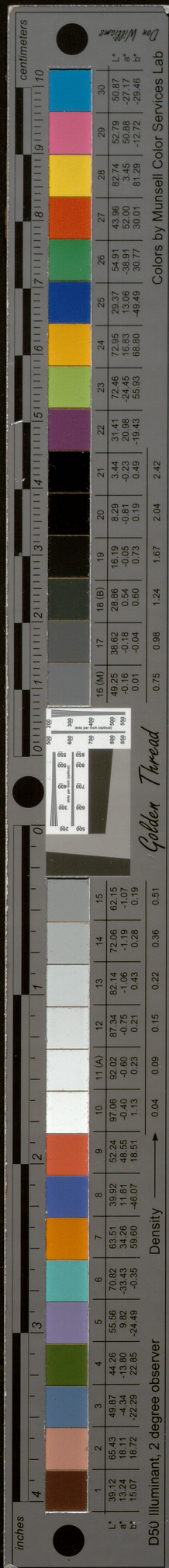
any religious, charitable, *literary*, or scientific use, shall fail for want of a trustee, &c."

Institutions which could be classified under either of those heads have been repeatedly held to be charitable institutions, and gifts to their use, or to be administered by them for any of those purposes, charities in the technical language of equity.

The most recent cases are Cresson's Appeal, 6 Casey, 450; The Evangelical Association's Appeal, 11 Casey, 316, and Miller vs. Porter, 3 P. F. Smith, 292. Among others, the following legacy was disputed in Cresson's Appeal: "I give and bequeath to the Pennsylvania University, at Philadelphia, the sum of five thousand dollars, to endow a professorship of the fine arts, so that the elements of drawing and sketching from nature may form part of the course of instruction of its alumni." Sustained as a charitable use.

In the Evangelical Association's Appeal, 11 Casey, 316, the bequests were to the "evangelical community or association." No trust was expressed. The association was unincorporated. It was objected that the bequests were void, "because they were made to an unincorporated association, and not upon any defined charity, or for any specified charitable use." The bequest was sustained because "the *purposes* of the organization were all such as the law denominates charitable."

In Miller vs. Porter, 3 P. F. Smith, 292, the will of John M. Porter was under consideration. He gave real and personal estate to trustees to found the "Porter University of Tarentum." It was *not* to be a free school. The trustees were expressly prohibited from putting the University under the charge, or administering it for the benefit of, any religious denomination, church, or sect; the persons to be taught were such as "may from time to time be determined on by the said corporation, and as the same may be set forth in their constitution, by-laws, and regulations." It was objected that this was not a charity, because the object was to perpetuate the name of Porter, and because there was no religious element in the trust, and because the tuition was not free. The Supreme Court over-





ruled these objections, using the following words: "You say it was not founded to promote religion or religious education, but to immortalize the founder, and therefore it was not a charity. If the premises be granted, the conclusion does not follow, because, though it has no stamp of religion, and the selfishness of motive may take away from it the high and abstract quality of a Christian charity, yet it was to be a seat of learning, a university, *a centre from which the rays of educated intelligence were to radiate in all directions*, and if to found a school-house at the cross-roads of a township be a legal charity, though the selfish motive be apparent, much more to found such a university is a legal charity, &c., &c." "No matter that it was not to be a free school; it was to bring the opportunities of education nearer home to the people; and he who cheapens popular education, or tempts a larger number into wisdom's ways, is a public benefactor, and what he does is, in the sense of the statute, a charity."

These are the very purposes for which this library was incorporated. The charter recites: "Whereas, Benjamin Franklin (and others) have, at a great expense, purchased a large and valuable collection of useful books, in order to erect a library for the advancement of knowledge and literature in the city of Philadelphia: Now know ye, that we, being truly sensible of the advantage that may accrue to the people of this province by so useful an undertaking, and being willing to encourage the same, have given and granted, &c., that the said Benjamin Franklin, &c."

And the Legislature has considered this Company a proper trustee in a very similar case, see ante pages 11, 13, for an Act of Assembly of March 31, 1792, constituting the Philadelphia Library Company the Trustees of the Loganian Library.

The will of Dr. Rush looks to the time when the Philadelphia Library Company shall receive a large building, and considerable property to be held on a perpetual trust, to increase the means of learning, for he says in his codicil of April 18, 1867: "In short, let the managers think only of the intrinsic value of



the additions to their shelves; for I hope, (yet fearfully), that the streams flowing into the Library will be clear, pure, and deep, diffusing healthy, truthful, and valuable information throughout the community," ante page 35.

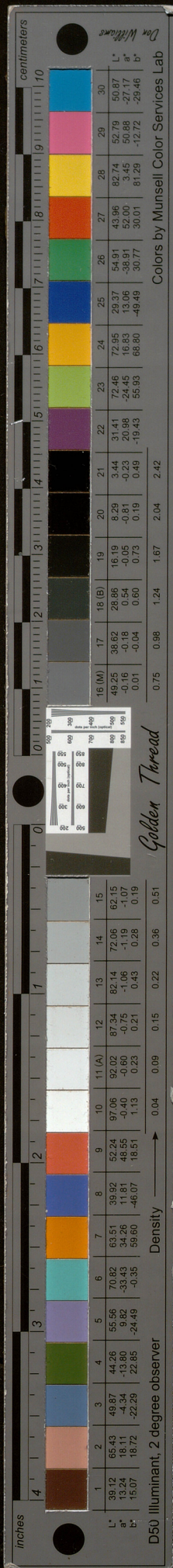
This view is supported by the language of Sir John Leach, vice Ch. in the case of *The Trustees of the British Museum vs. White*, 2 Sim. & St., 594.

This was a devise of a freehold estate to trustees to sell and pay the proceeds, together with his residuary personal estate, to the Trustees of the British Museum, to be by them employed for the benefit of that institution.

The devise was in the year 1826, of course subsequent to the Statute 9th Geo., 2 Ch. 36, which declared, that after the 27th of June, 1736, no manors, lands, &c., &c., or moneys for the purchase of such, should be given for any charitable use whatsoever, unless made by deed indented, sealed and delivered twelve calendar months at least, before the death of such donor or grantor." This Statute is not in force in Pennsylvania. *Le Lazure vs. Hillegas*, 7 S. & R., 321. *Church vs. Remigton*, 1 W., 224; *Miller vs. Lereh*, 1 Wall, Jr., 210.

Sir John Leach, V. C., in declaring the devise as to the real estate void, says: I understand that every gift for a public purpose, whether local or general, is within 9 Geo., 2 Ch., 36, although not a charitable use within the common and narrow sense of those words. The gift is to an institution established by the Legislature, for the collection and preservation of objects of science and of art, partly supported at the public expense, and partly from individual liberality, and intended for public improvement, consequently, I must declare this devise void as to the real estate." That is an authority in favor of the complainants on this point.

But the defendant refers to a clause in the first codicil of the will, as taking from this devise and bequest and from the Philadelphia Library Company, their charitable character, using the word probably in its restricted meaning. It is not said that it affects their literary character,





The paragraph referred to is in the second codicil and is in these words :

"The number of shares in the library shall be limited to those actually issued at the time of my death. But the managers, by their by-laws, shall have the authority to allow any respectable person depositing an amount, and paying an annual sum, to be fixed by the Board of Managers, to have the full use of the library, as completely as if they were shareholders."

This, the defendant argues, makes the library a close corporation and devotes the original property, and that intended to be given, to the use of an ascertained number of persons, identified by being the owners of certificates of stock, whereas, he says, indefiniteness as to those who are to be benefited, without any particular person being present to the mind of the testator, is requisite to the legal or equitable view of a charity, and the counsel cite in support of this position, which they have strongly urged, *Thompson vs. Shakespeare*, 1 DeGex, Fisher & Jones, 406 ; *Carne vs. Long*, 2 DeG., F. & J., 75.

Before reviewing these authorities, it will be well to point out what seems to the Master to be the defect in the argument. There is no change, as the Master views it, produced by the provisions of this codicil in the persons entitled to use the library.

By the original charter the persons enumerated, "and such other persons as shall hereafter be admitted, or become members of the Library Company of Philadelphia, according to the laws and constitution of said company, hereafter to be made," &c., &c., shall be a body corporate.

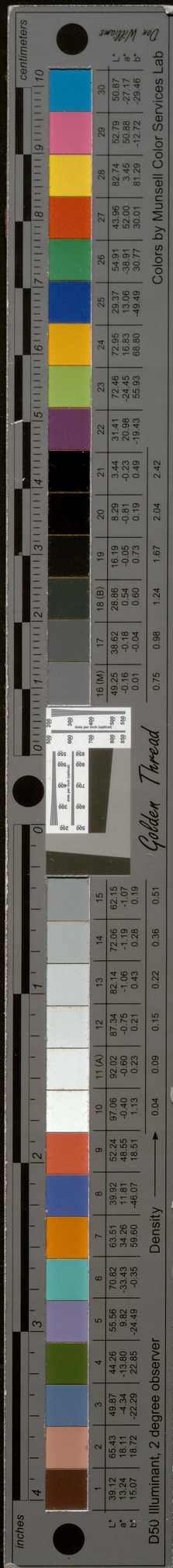
"Provided, always, That for the increase and preservation of the said library every member of the said company shall and do pay into the hands of the said company's treasurer, for the time being, the sum of ten shillings on the first Monday of May in every year forever," with a provision for forfeiture of interest in case of non-payment.



Then the rules (page 7 ante) provide the terms on which members may take books. The codicil says no new shares, "but the managers, by their by-laws, shall have the authority to allow any respectable person disposing an amount and paying an annual sum, to be fixed by the Board of Managers, to have the full and free use of the library as completely as if they were shareholders." The managers under the charter admit, at their discretion, new members. The managers under the codicil admit, at their discretion, persons to as complete a use of the library as if shareholders, the effect of the codicil being simply to limit the number of votes for managers, not to limit or restrict the number of those by whom the library is to be used. The number is indefinite and constantly changing, and is to go on forever, embracing a constant succession of objects, thus bringing it within the second of the two ways pointed out by Boyle, in which a testator may evince an intention of treating a bequest as charitable. "He may do this," says Boyle (Law of Charties, p. 37), "either by the use of terms and expressions which leave no doubt on the subject, and this occurs where the fund is sooner or later to be dissipated and lost by its entire distribution; or by directing such an application as would be inconsistent with the notion of a mere legacy, which is the case where the fund is to be of a permanent nature, embracing a constant succession of objects.

See Evangelical Association's Appeal, 11 Casey, 321, 322. The judgment of Judge STRONG. The doctrine there enunciated would make the devises and bequests, under Dr. Rush's will, charitable bequests, even if no trust was declared in favor of the Ridgway branch of the Philadelphia Library.

But to return to the defendant's authorities. *Thompson vs. Shakespeare*, (1 De Gex, Fisher & Jones, 406,) was the case of a will made subsequent to the Act of 9 Geo. 2, c. 36. A section of the will gave to trustees "the sum of 2,500 pounds, to be laid out by them as they shall think fit, with the concurrence of the masters of Shakespeare's house, already sanctioned by me, in forming a museum at the Shakespeare house, in





Stratford, and for such other purposes as my trustees, in their discretion, shall think fit and desirable for the purpose of giving effect to my wishes." The museum was to be of Shakespearean relics. However pleasing such a collection might be to the curious, it had nothing about it in any sense charitable, or literary, or conducive to the benefit of the public. Held not a charity, and therefore not void under the statute 9 Geo. 2. But as it was not for the individual benefit of the trustees, but upon a trust void for uncertainty, the devise failed, the Chancellor saying: "The alleged uncertainty as to the erection of a museum might be got over; but what follows seems to be fatal to the bequest to private individuals, "and for such other purposes, &c., &c."

The Master is of opinion that this case does not support the position of the defendant.

*Carne vs. Long*, 2d De Gex, Fisher & Jones, 75, was a case in which the devise was in these words: "And from and after the decease of my said wife I give and devise all that my freehold mansion house and premises, called the Abbey, situate in Penzance, with the appurtenances thereunto belonging, unto the trustees for the time being of the Penzance Public Library, to hold to them and their successors forever, for the use, benefit, maintenance, and support of said library."

The articles of association contained a provision that whenever the members shall be reduced to ten, all donations shall be returned to the donors, and their representatives who may claim the same, and the remaining books and other articles shall be forthwith sold at public auction, and the proceeds given to some art institution.

Lord Campbell—upon the ground, probably, that this was an association for the mutual benefit of the contributors, and of no other person—held that this was not a charity. He does not say what the ground was. It was said in the case that the Library might not be permanent; that it was possible it might come to an end, and the property be divided. The Philadelphia Library Company has none of these characteristics.

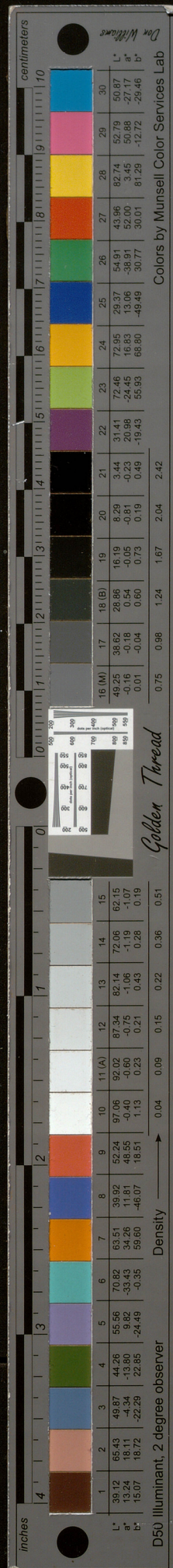


The Library cannot be said to be established for the mutual benefit of the shareholders, and of no other person. It has always been free to be used by any civil person in the rooms, and any person who shall deposit the value of the book with the librarian may take it out as a member may. All sums received from the hire of books and the annual dues of members, are for the expenses of maintenance and the increase of the stock of books. The member has no pecuniary advantage over any other person. He may vote for managers, which the non-shareholder may not. The shareholders now number about 1,100, (p. 159, Ex'r Rep). By no possibility can they ever dissolve the corporation and divide its property. The original charter, towards the end of it (ante page 5) has this provision: "Provided always, that for the increase and preservation of the said Library every member of the said company shall and do pay into the hands of the company's treasurer for the time being the sum of ten shillings on the first Monday of May, in every year, forever; and those who neglect so to do, shall pay such greater sum or sums, in lieu thereof, at such times within twelve months then following, as by the laws of said company shall be appointed; and that, in default of these payments, any delinquent shall forfeit his share in the books and estate of the said company, and be no longer a member." This would be fatal to any project of division. At all events, the trust of Dr. Rush's estate for the Ridgway Branch of the Library is one which cannot come to an end.

The fifth specification of demurrer, the master is of opinion, cannot be supported. It is in these words:

"The interference by the Court in favor of a private corporation, such as the complainants are, will be in prejudice of a great charity for the benefit of the public, which the 'Ridgway Library' will be, if endowed under the provisions of Dr. Rush's will, in the event of the refusal or omission of the complainants to accept the devises in their favor."

The propriety of the interference will depend upon the plain-





tiffs' rights to be presently considered, on the inquiry whether the prayers in his bill can be sustained. It is plain that the testator considered the public charity the same whether administered by the Philadelphia Library Company or by some other trustee. He preferred the former. And if he has given them rights which the Court will protect, or ought to protect, the action of the Court in so doing cannot be "in prejudice of a great charity for the benefit of the public," in any sense which should induce the Court to withhold its action.

The sixth specification of demurrer, is: "The Court has no jurisdiction to control my discretion in the selection of a site for the building, nor in the execution of any of the trusts of the will."

This is as a general proposition true if the discretion exists.

But the point of the plaintiffs' bill is, that after the subject was confided to the discretion of the defendant, and before the time for exercising it arrived, he had incapacitated himself from exercising discretion in the premises. This brings us to consider whether the prayers of the plaintiff's bill can be sustained; if they can, this ground of demurrer fails.

The first prayer of the bill is, "that the rights of your orators and of the defendants in the premises may be ascertained and declared." That, of course, is what to a certain extent must be done in whatever way this cause is disposed of.

The second prayer, viz.: "That it may be declared and decreed that the power conferred on the defendant by the will of the testator was a trust to be administered by him only in the manner in which all trusts can of right, or ought to be administered." The Master believes to be a correct statement of the law.

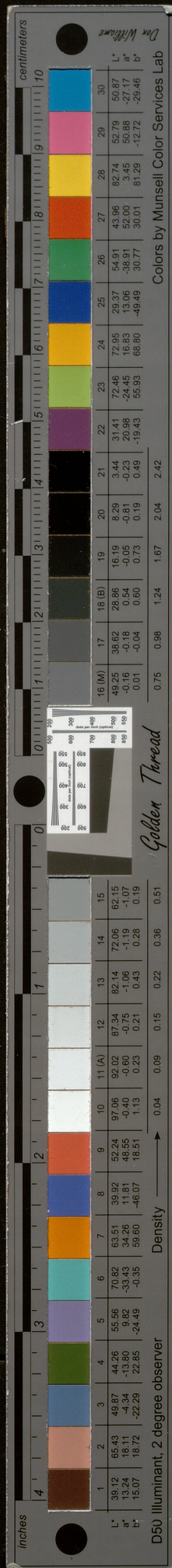
As the proposed building, when completed, is to be conveyed unto "The Library Company of Philadelphia and their successors" for the uses and purposes of their library, and "The Ridgway Branch of the Philadelphia Library," and



for a "monument," and for "keeping the pictures, &c., of the testator;" [for on a consideration of the whole will and codicils, it is clearly the intention of the testator that it is to be held for all these purposes, notwithstanding the restrictive language of the early part of the will (page 16, ante), that it is to be "for the uses and purposes of their (The Library Company of Philadelphia) library, and for no other use or purpose whatever," and notwithstanding in the first paragraph of the additional codicil he calls the Philadelphia Library Company the "heir to his estate,"] provided, always, they accept the same on the terms and conditions in the will and codicils contained. The interest of the complainants in their double capacity of trustees and *cestui que trusts*, is contingent on the site and building being such as they can accept. In the meantime their interest is one which entitles them to the aid of this Court to prevent an illegal or inequitable exercise of the power of selection to their detriment. The will of Dr. Rush speaks from his death as to all its provisions, and is incapable of being varied by parol testimony, unless a latent ambiguity is discovered. The will gives a lot to be selected at the discretion of the defendant. From the moment of the testator's death the complainants had an interest in the nature of property in the *bona-fide* exercise of that discretion; and, of course, a right to the interposition of this Court to protect that interest from any illegal or inequitable interference or abridgment.

The expression used in the additional or second codicil, "I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, and select any situation he may deem expedient," while in one sense conferring a discretionary power, in another, imposes a duty as coupled with that power, which the donee of the power cannot refuse to perform, which makes him a trustee, and the power a trust, so that if not executed by him the court will execute it.

Lord ELDON, in the well considered case of *Brown vs. Higgs*, 8 Vesey, 574, thus states the law: "The principle of all these





cases is that if the power is a power which it is the *duty* of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it. "Stated in a note to this case, in Sumner's Edition of Vesey's Reports, to have been approved in the House of Lords in 1813. The draftsman of the will and codicils seems to have been aware of this distinction towards the close of the fourth paragraph of the additional codicil (ante page 34); he confers a discretionary power of a kind which no court could interfere with—and in much stronger words than are used when speaking of the selection of the site.

In the case before us, the devise is to the trustee, among other things, to exercise this discretion, that is to select the lot and build upon it. The interest of the *cestui trust*, or the right of the new trustee, *i. e.*, the Library Company, to assume the trust after the completion of the building, would not fail if Mr. Williams should die before making the selection, nor would it go to the substituted executors, Messrs. Craven or Biddle, but would be executed by the court.

The will, therefore, creates an interest in the plaintiffs which this court will protect, and the discretion allowed the donee of the power is so inseparable from the duty to select and build, as to make the defendant to all intents subject as to both to the law applicable to trusts. If the trustee, donee of the power named in the will, should refuse to execute the trust, or die, the court would, if necessary, appoint a new trustee, or in some other manner carry out the intentions of the testator. They would not be allowed to fail because of the inability or refusal to act of the trustee named in the instrument. *Burroughs vs. Philcox*, 59 My. & Cr., 92; *Brown vs. Higgs*, 4 Ves., 708; 8 Ves., 574.



Where the discretion lodged with the trustee has relation to some ministerial act, it is much more under the control of the court, than where it depends upon the exercise of opinion or personal judgment, such for instance, as when the consent or approbation of a trustee is required to a marriage, or to the conduct of an individual. *Milsington vs. Mulgrave*, 3 Mad., 491; *Mortimore vs. Watts*, 14 Beav., 616. Suppose the promise had been to build at Manayunk, Frankford, or Germantown; would the complainants have been bound?

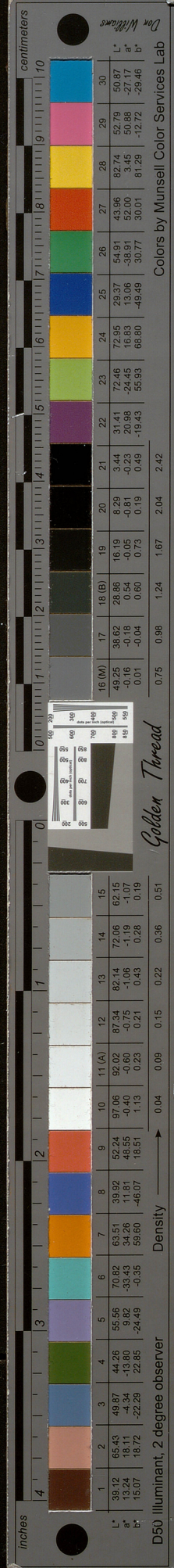
Applying these principles to the IV. prayer for relief which is in these words: "That the court may decree that the defendant, being at and before the time when the said trust vested in him, or supposing himself to be under an obligation which bound his discretion as to the selection of a site for the said building, was and is thereby disqualified from, and incapable of exercising the power and trust in that behalf given to him by the said will, and that the same may be exercised by this court having jurisdiction in the premises."

We have to inquire, first, as to the fact of the alleged disqualifying obligation; 2d. Whether it does disqualify; and, 3d. If it does, how is the testator's intention to be reached or carried out.

The evidence of the alleged disqualifying obligation is found in the answer, and is asserted by Mr. Williams in his letter to Dr. Charles Willing, printed (page 18 of bill) as exhibit B to the answer; and also on page 44 ante of this report; and in paragraph 14, page 19, of the answer where the defendant says: "I admit that I wrote to Dr. Willing, on December 30th, 1870, the letter from which an extract has been given. Its statements are true."

The conversation mentioned in this letter took place about eight days before Dr. Rush's death. See ante page 36.

It thus appears that at the time of Dr. Rush's death the defendant was under a pledge, given under circumstances





which rendered it "*as sacred as an oath*," to put the building on a particular site.

Did that disqualify him from exercising the discretion which the testator had confided to him, and to the exercise of which the complainants were entitled by the terms of the will?

It is a difficult, and, in some senses, a delicate question.

For, while the master sees clearly that it may be answered in the affirmative without casting the slightest imputation on the defendant's integrity and good faith, which are above suspicion, it may be difficult for the defendant so to regard it.

The discretion which the complainants were entitled to, was the free, voluntary, untrammelled judgment on the question of site of a gentleman long a member of the Library Company, familiar with its wants and wishes. No single individual could have been named upon whose spontaneous opinion as to site the complainants would probably have been more willing to rely. But it was *that* they were entitled to, and nothing less. That was Dr. Rush's will. The will spoke from May 26th, 1869, the day of Dr. Rush's death. *Potts vs. Britton*, Eq. cases, Law Reps. 11, page 438. There was no latent ambiguity. Parol evidence could not be admitted to change it. There had been no revocation;—there had been no alteration by Dr. Rush. Consequently his will stood as it was written when the last codicil was executed. To give effect to Dr. Rush's parol wishes *as* his wishes, declared a few days before his death, would be to alter his will contrary to the statute of wills. The keeping of the promise to Dr. Rush is not what the plaintiffs are entitled to. That promise was upon Mr. Williams with all the solemnity of an oath, when the duty of exercising an untrammelled discretion was cast on him by the will. Had he at that date any discretion to exercise? He says he had. It is a question, perhaps, on which he is incompetent to judge. In passing upon it, the character and person of the present defendant must be put out of view. Was his discretion free in the view of a court of equity? Cases somewhat analagous will, perhaps, afford us a clue to the answer.

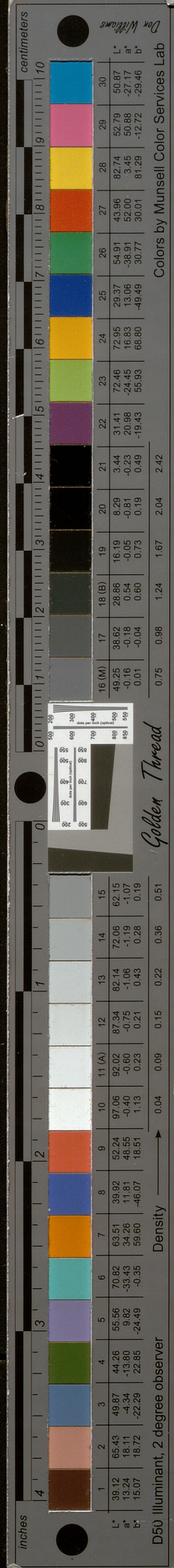


One who has a private interest, or who has been counsel in a cause, by common consent is disqualified, if promoted to the bench, from sitting as a judge at the trial or hearing of the cause. A juror would be incapacitated if he had promised either of the parties to find for him. Such a situation as is presented in this case is as disqualifying to a man of Mr. Williams' character as the more coarse and vulgar one of a pecuniary consideration would be to a lower order of men.

The precise question raised in this case has not, so far as the master is aware, been adjudicated; but there are a few cases in the English equity books in which principles are discussed and applied in a way which shows how such a case would be treated in those tribunals.

In re Beloved Wilkes Charity, VII. Eng. Law & Eq., 73, S. C. 3 M'Noughton & Gordon, 440. In 1722, certain freehold estates were devised to the ministers of Puckle-church, Doynton and Dirham, in trust as to part of the rents, "to and for the maintenance, education, schooling, qualifying for, putting to, and keeping at Oxford of a lad, in order to make him a minister of the Church of England, which said lad his said trustees should choose of the said parishes of Wick and Abson, Puckle-church, Doynton, or Dirham, and of such parents who were not of ability to give him such maintenance and education as aforesaid, and that they should not choose one of their own sons; and when and so soon as such person should have taken the degree of Bachelor of Arts, then or before, if the income thereby appointed for that purpose would admit thereof, his said trustees should choose and elect such another lad as aforesaid, and maintain, educate, fit him for, put him to, and keep him at Oxford till he should have taken the degree of Bachelor of Arts as aforesaid, and so on in like manner forever."

It had been settled by the Court that the lad to be educated should come from one of the four parishes named, if any such lad could be found in either of those parishes whom the trustees, for the time being, should think eligible; but if not, then





to be chosen by the trustees from any other parish of England or Wales, but the specified parishes to be preferred.

In 1848 the Rev. Wm. S. Robinson was rector of Dirham, the Rev. T. B. Coney, vicar of Puckle-church, and the Rev. L. B. Clutterback, rector of Doynton. On the 22d of February, 1848, one E. Gale, an inhabitant of Doynton, wrote and sent a letter of that date to the Rev. W. S. Robinson :

“REV. SIR:—I should feel obliged by your informing me if the donation bequeathed by the late Mr. Beloved Wilkes for the education of a lad belonging to either of the four parishes named in the aforesaid will, is applicable for the purpose of educating my son. If it should be applicable for him, I should thank you for your interest in electing him to receive the benefit thereof.  
E. GALE.”

Mr. Gale received this reply :

“The Rev. Mr. Robinson informs Mr. Gale that he will take care to lay his letter before the trustees of the Wilkes Charity at their annual meeting ; but, speaking individually, Mr. R.’s opinion is, that Mr. Gale’s son will not be eligible. Dirham Rectory, March 14, 1848.”

On the 13th of June Mr. Robinson wrote again to Mr. Gale, referring to his former note, saying that Mr. Gale’s note had been laid before the trustees and considered by them, and concluding : “I am directed by them (*i. e.* the trustees) to inform you that the funds of Wilkes Charity are not at present applicable for the education of your son.”

Mr. Gale subsequently discovered that on the said 13th of June a lad named Charles Joyce was elected, and that he was not a native of or resident in any of the four parishes named in the testator’s will.

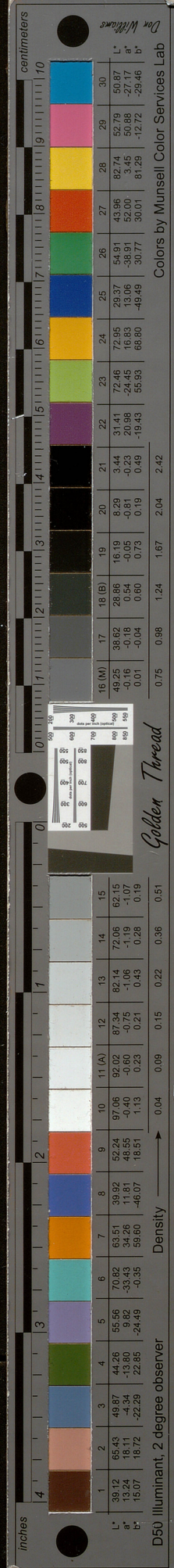
After some correspondence between Solicitors, a petition was filed by E. Gale and four other residents of the four parishes, setting forth the above facts and many others having relation to the petitioner’s son and the person appointed. The petition con-



cluded: "That E. Gale was a farmer, and the said W. Gale was a fit and eligible object for the said testator's bounty, but that, as the petitioners believed, the said trustees considered they had an arbitrary power of selection, and that the sons of farmers and agriculturalists were not desirable persons to be educated for the ministry of the church; and although the petitioners did not impute any corrupt motives to the said trustees, yet they submitted that the trustees had misconceived their duties, and had acted in the matter set forth contrary to the instructions of the founder," and prayed that the election of Joyce might be declared void.

The trustees filed a counter affidavit, in which they said that on three former occasions non-residents had been appointed—that they were all well acquainted with the people of their respective parishes, and some of them with the Gales—that on the day of the election they had all been together, and had given most serious consideration to the cases of the two applicants, "and that in the full and free and fair and *bona fide* exercise and discharge of the discretion and duty given to and reposed in us, in and for the purpose of the execution of the charity, and without favor or affection, or caprice, or ill feeling towards, or with respect to, any individual, or *any class or grade of persons whatever*, we unanimously considered the said C. Joyce the proper object for the benefit of such charity-trust, and elected him accordingly." On the 9th February, 1850, Lord CRANWORTH, Vice Chancellor of England, made an order declaring that the election of Joyce was, under the circumstances, improper and a breach of trust, and that W. Gale was eligible, that a new election should be held, and that the Trustees should pay the costs.

An appeal was taken to this order and argued before Lord Chancellor Truro, who, after an elaborate judgment, reversed the order, each party paying their own costs. The ground of reversal was, that there was no evidence of any other than a *bona fide* exercise of their discretion by the trustees. It is evident from the judgment of the Chancellor, that if it had been





shown that the Trustees had laid down a rule that the sons of farmers were not persons in a situation of life fit to be the objects of the charity, he would have sustained the order, notwithstanding the plenary discretion given them by the will.

"I have looked," says Lord Truro, "with considerable diligence to see if I could discover any foundation for the idea, that the Trustees ever had laid down any such rule, and I am quite unable to discover how the idea could have arisen;" and again, "I see no ground whatever for supposing that the Trustees were acting upon any aristocratic rule, or any rule so absurd, as, that a person—the founder devising property, for the benefit of the inhabitants of an agricultural district—intended that the sons of farmers in that district, sons of persons incompetent to maintain them, should not be eligible as the objects of this charity." Page 81.

The existence of an intent on the part of the appointor, as evidenced by the communication to the appointee after the appointment had been made, of a purpose inconsistent with the power, was held sufficient to vitiate the appointment, though the appointee had not before the appointment been privy to the arrangement. *Marsden's Trust*, 4 Drewry, 600.

*Topham vs. The Duke of Portland*, 5 Ch. App. Cases, Law Rep. 40.

A settlor by deed declared that trustees should hold certain funds after his death upon trust for his daughters Harriet and Mary, or one of them, as his son should appoint, and in default of appointment should pay the dividends to H. and M. in equal shares during their joint lives, with remainder over. At the time when the settlement was made, the settlor objected to the proposed marriage of M., and made the settlement in order that in the event of the marriage, the income should be appointed as to one-half for H., and as to the other half to be dealt with according to circumstances. After the death of the settlor M. married, and the son thereupon appointed the income of the whole fund to H. for her life reserving a power of revocation. H. was not informed that the appointment had been made, and it was shown that the intention of the son and of



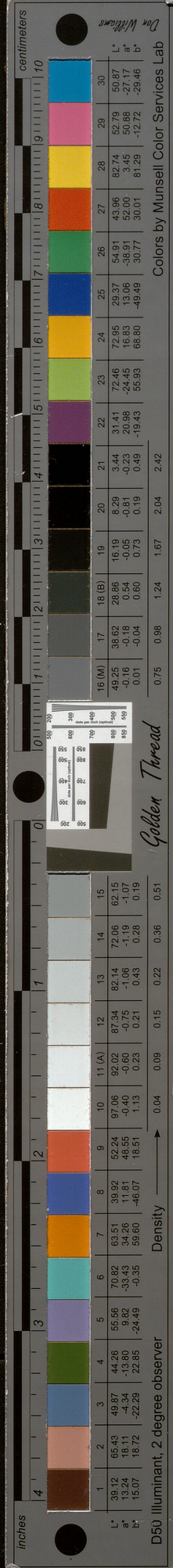
H. was to accumulate one moiety of the income and hold it in suspense. In a suit instituted by M. this appointment was declared void as a fraud on the power.

The son then executed a second deed of appointment, appointing the income to H. during the joint lives of herself and M. absolutely. H. was informed that this appointment had been made, and she and the appointor deposed that there was no agreement between them as to the disposition of the income. Under the circumstances, Lord Chancellor Hatherley, affirming the decree of V. C. James, held the second deed of appointment void. The Chancellor said, "I think a valid appointment might have been made to her (H.) of that fund; but the real point for consideration is, whether or not, though now conscious of her strict right at law to dispose of the fund, the pressure of a moral obligation not to appropriate more than one-half of it to her own use, and to hold the other half subject to the Duke's intentions and for his purposes did not, at the date of the last appointment, and does not now, weigh on her mind with such force as to convert her into a more passive instrument of the Duke's intentions, and whether such her sense of moral obligation is not well known to the Duke."

"I think upon the whole case that the Vice Chancellor has come to a right conclusion, and that the appeals must be dismissed with costs. Sir G. M. Giffard L. J., concurred.

The Duke, was the Duke of Portland, and son of the settlor, and donee of the power he had been examined as a witness in the cause and had stated that his object was to carry out his father's wishes, and he was "a dummy" in the late Duke's hands.

The principle of these cases, it seems to the Master, is applicable to the case in Court. Mr. Williams avows his intention to carry out the testator's wishes and directions, but denies being a passive instrument, but asserts that in the selection of this site he exercises an untrammelled discretion, which, happily for him, enables him to carry out the testator's instructions, and his counsel insist that this statement being in the answer,





and in response to the bill, must be taken to be the fact, unless overthrown by two witnesses, or one witness and sufficient circumstances.

The Master is of opinion that this is not a case for the application of that principle of equity evidence.

It is impossible for any man, however cool and unimpassioned he may be, to know exactly how far his judgment would be influenced by a promise so solemnly given as that given by the respondent in this case.

The language of C. J. Marshall, in the case of *Clark vs. Van Reimsdyk*, 9 Cranch, 153, applies: That careful and accurate Judge says: "That either two witnesses, or one witness, with probable circumstances, will be required to outweigh an answer asserting a fact responsive to a bill, is admitted. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness. The weight of an answer must also form the nature of evidence depend in some degree on the fact stated. If the defendant assert a fact which is not and cannot be within his knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. Thus, when the executors say that Clark never gave Monroe authority to take up money or draw bills; when they assert that Reimsdyk, who was in Batavia, did not take this bill on the credit of the owners of the Patterson, but on the sole credit of Benj. Monroe, they assert facts which cannot be within their own knowledge. These traits in the character of testimony must be perceived by the Court, and must be allowed their due weight whether the evidence be given in the form of an answer or a deposition."

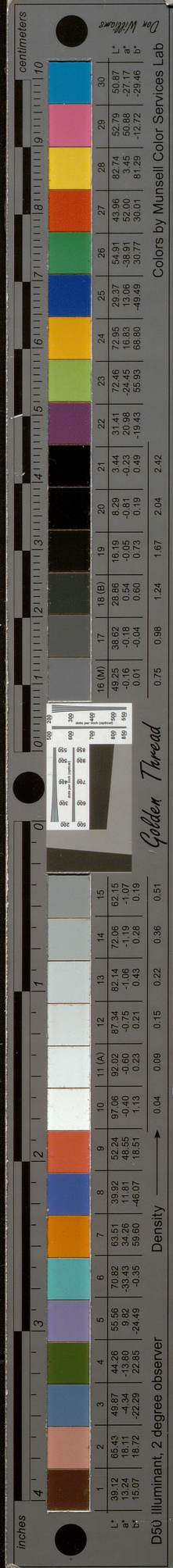
The Master is discussing the abstract legal question disclosed by the pleadings, and has no intention to intimate any opinion as to the question whether the lot in question is the best for the purpose or not.

We come, then, to the third question, how is the will to be carried out.



The answer is, that the court will either, through a new trustee (if that step is necessary) to be appointed by them, or by a decree framed after a report from a master, carry out the intention of the donor if it can be ascertained. In this case the prevailing intention which manifests itself all through the will and codicils is that The Philadelphia Library Company shall, if they wish, become possessed of the building (which the testator has made it the duty of the immediate devisee in trust, to erect) to be by them held in trust, to be used for their own books, for books to be acquired from funds provided by his estate, for a monument to his wife and her father, &c.; And even if they refuse the trust, the testator declares that it will be in accordance with his wishes to allow them to use the building as a place for keeping their own books, and, at the same time, that they may be permitted to act as custodians of the books belonging to the Ridgway Branch, &c.; (will, ante page 34). The manner of building is pointed out in the will, the only point left uncertain being the site.

The court can enter into all matters in relation to those things that are beneficial to the estate, and into the motives of the trustees for exercising or refusing to exercise their powers; and courts will not allow the trustees to exercise their powers in this respect in an arbitrary or capricious manner. *Webb vs. Shaftesbury*, 7 Ves., 480; *Attorney Gen'l vs. Clark*, 1 Beav., 467; *De Manville vs. Crompton*, 1 V. and B., 359. If the court has acquired jurisdiction of the case by bill or decree, the trustees must act under the sanction of the court in appointing new trustees, making investments, sales, leases, and in varying securities, *Webb vs. the Earl of Shaftesbury*, and the *Earl of Shaftesbury vs. Arrowsmith*, 7 Ves., 480, unless the instrument of trust declares that their discretion is to be uncontrolled. *Mislington vs. Mulgrave*, 3 Mad., 493, *Lee vs. Young*, 2 Y. & C., Ch. Ca. 536. The Supreme Court of Massachusetts, in *Saltonstall vs. Saunders*, 11 Allen, 456, in pronouncing their decree, say, "If at any time hereafter doubts should arise as to the mode of distribution or *the trustees should exercise their discretion illegally*





or *unreasonably*, this court, upon bill or information, may control and regulate the administration of the charity," and see *Pulpress vs. The Church*, 12 Wright, 204; *De Peyster vs. Clendinning*, 8 Page, 296; *Fontain vs. Ravend*, 17 How., 369, relied upon by defendant, is not opposed to this.

The defendant, in his answer, page 15, meets this by saying:—

"I deny the averments in the third section of said paragraph. I am advised, and therefore aver, that the complainants are not a charitable corporation, and that the discretion given me to select a site for the library company is not therefore in the nature of a trust for them; but that if the law and the facts are as stated in the bill, then as the will speaks as of the day of the testator's death, if, in his lifetime, by his own act, he disqualified me from the exercise of the discretion given to me by the will, the bequest to the Library Company being dependent upon the exercise of that discretion as a condition precedent to the vesting of the estate, no Court of Chancery can dispense with the performance of that condition.

"I am advised, and therefore aver, that my disqualification to exercise my discretion, supposing it to exist, having arisen from acts of the testator himself, the complainants can take no benefits under his will conditioned upon a prior exercise of my discretion, however ready they may be to comply with all the 'other conditions and regulations.'"

The master is of opinion that this argument is fallacious. The testator did nothing to disqualify the executor; he could impose no duty upon him. The disqualifying promise was the act of the executor. The selection of the lot was an incident merely of the testator's main intent, which was that a building should be erected suitable for a library building, and for a memorial or monument. The duty imposed upon the defendant was to erect a building, conformably to the plan described by the testator, and tender it to the Library Company. The testator had not made up his mind on what site, but that he must select some site was a necessary incident to the duty imposed upon the trustee.



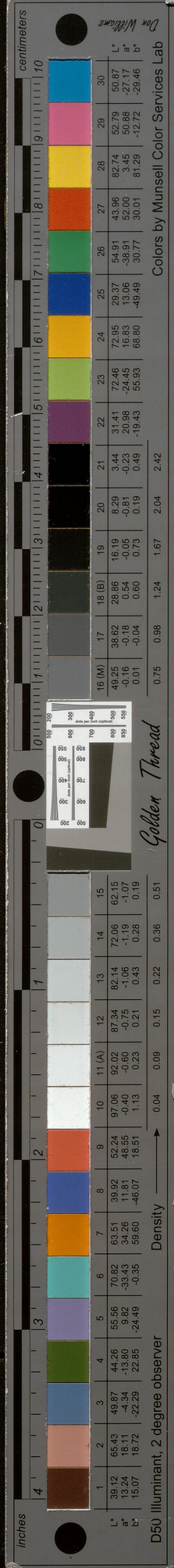
Supposing there to be no difficulty about the site, could the trustee have said the erection of a building is a condition precedent to the vesting of the estate, and because I promised the testator in his life that I would not erect the building, I refuse to do so? The devise in trust to the library therefore fails. I think not. The Court would compel the trustee to act. To say that anything which was said by Dr. Rush to his trustee and executor could change his will would be pro hac vice to repeal the statute of wills. The testator did nothing to disqualify the executor and trustee named in his will.

The conclusions then to which the Master has come upon the questions submitted are that the will was not affected by the promise; that the trustee, by his promise, has so crippled his discretion as to make it impossible to say how much his preference for the lot in question is due to his unbiased opinion that it is the most expedient for the purpose, and how much to his promise to Dr. Rush; that his action in the premises must therefore be under the direction of the Court.

That the complainants have an interest in the selection of the fittest site, which gives them a standing in a Court of Equity to ask that the selection be made under the supervision of the Court; that this course is not to be viewed as an expression of opinion adverse to the site proposed by the executor; that it be referred to a Master to inquire and report to the Court whether the proposed site is a proper and expedient location for the said building, and if not, what would be such a site? and that the defendant be restrained by injunction from proceeding to erect the said building on the said lot on the south-east corner of Broad and Christian Streets until further order. Of course the last specification of demurrer fails with the rest.

The master submits a form of decree drawn in conformity with the above report.

Respectfully submitted by  
P. PEMBERTON MORRIS,  
*Master.*









LIBRARY Co.

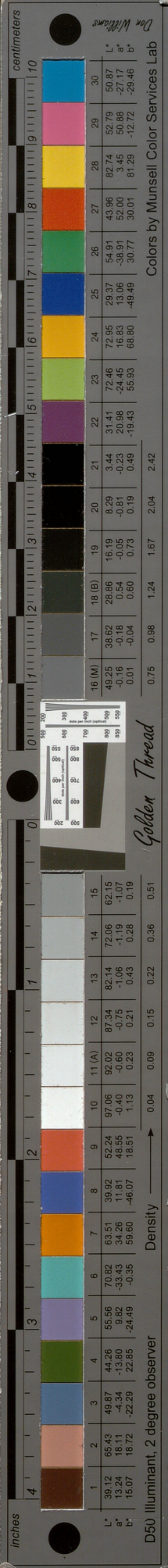
vs.

WILLIAMS.

Decree.

See 18 33  
of pamphlet 5

And now, this                      day of                      A. D. 1872, this cause came on to be heard upon bill, answer, replication and proofs, and was argued by counsel; Whereupon, in consideration thereof, the Court are of opinion and so declare, First, that the complainants are competent to, and of right may, when the proper time shall arrive, assume the trust confided to them by the will of the testator, Dr. James Rush; Secondly, that all the powers to that end conferred on the defendant by the will of the said testator are trusts, in which the complainants have an interest in the nature of property, and which are to be administered by the defendant only in the manner in which all trusts can, or of right ought to be administered; And it appearing to the court, as well by the written admissions of the defendant as by his answer and testimony in this cause, that at and before the time when the said trust vested in him, he had absolutely bound the discretion intended to be given to him by the said will as to the selection of a site for the building proposed by the testator to be erected, and was and is thereby disqualified from, and incapable of exercising the power and trust in that behalf given to him by the said will, and that, in order to carry out the true intent and meaning thereof, the said trust may, and should be now exercised under the super-





vision of this Court according to the course and practice of chancery;—it is, therefore, ordered and decreed that it be referred to

Esq., as master, to inquire and report what would be the most expedient situation for the said building, to the end that the true intent and purpose of the testator, as contained in his will, may be carried into full effect; And that he have authority to take testimony in addition to that taken before the examiner; And that the defendant be restrained, until further order, from proceeding to erect the said building on the lot situate at the southeast corner of Broad and Christian Streets; And the Court reserves all questions of costs and expenses for its further consideration.



LIBRARY COMPANY

vs.

WILLIAMS.

The Master gave the required notice that his report was ready, and would be filed on the 4th November, 1872.

The request and exceptions annexed have been filed with him by the respective parties.

He has given them and the matters to which they relate careful examination and consideration.

So far as relates to the statement on page 52 of his report, to which his attention has been called by complainants' counsel, he thinks the effect of the evidence is best stated by omitting the words, "probably had gone before reading," from page 52.

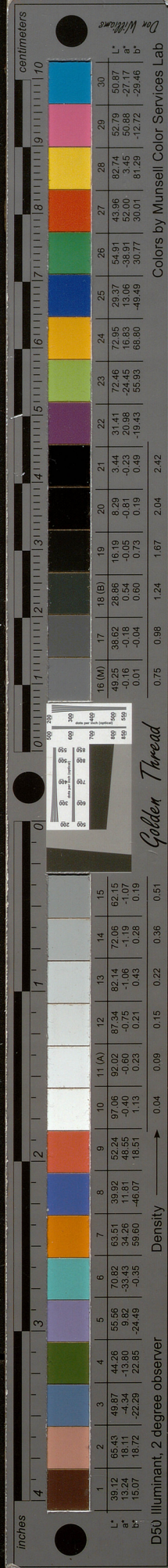
As to the exceptions filed by defendants' counsel, the Master sees no reason to change the conclusions arrived at by reason of anything contained in them.

On careful re-reading of the bill he thinks the tenth exception is possibly well taken, and that the time referred to in the XXIV. paragraph of the bill may be the 10th December, 1870, and not the 29th June, 1869, as he has reported. Either is prior to the receipt of the letter of Dec. 30, 1870. It does not, however, change his opinion that the third ground of demurrer is not well taken.

P. PEMBERTON MORRIS,

*Master.*

November 4th, 1872.





Complainants' counsel desire the Master to reconsider that part of his report on page 52, in which he states :

"The Master is of the opinion, from the evidence, that Mr. Williams did not hear the report read, probably had gone before reading," it being, as they conceive, not supported, but contradicted by the testimony as per the annexed statement thereof.

RAWLE,  
McMURTRIE,  
*for Complainants.*

#### STATEMENT.

Page 193, a. Minutes of meeting of June 3, 1869. Exhibit 42. "Present, Messrs. Williams," &c.

Page 226. Testimony of Lloyd P. Smith. Recollects remarks made by Mr. Williams after report had been read.

Page 228. Testimony of Peter McCall. "Reading of report was one of the earliest things done at meeting."

Page 230. Testimony of Henry Wharton. "Mr. Williams, who was quite deaf, had his hand up to his ear, listening to the report."

Page 103 i, June 10, 1869. Report of Committee recommending propriety of taking opinion of counsel not connected with Board.

Page 235, June 11, 1869. Letter from Mr. Williams to Mr. McCall. "*After* the meeting of the Board in the afternoon, it appeared not impossible that some legal proceedings would be instituted."

Page 235. In evening after report was read, Mr. Williams retained Judge Strong.



## DEFENDANT'S EXCEPTIONS.

1. The Master has erred in reporting, on page 52, that in the letter of 30 Dec'r, 1870, from Mr. Williams to Dr. Willing, "he expresses the determination to build on the lot at Broad "and Christian Streets, and 'nowhere else,' according to his "promise given to Dr. Rush;" for the letter expresses no determination to build there "according to his promise." It only argues that he (Mr. Williams) ought not *voluntarily* to violate such a promise, in opposition to his own deliberate judgment that the site he had selected was best, merely to gratify the wishes of shareholders who had refused to express their gratitude for the gift they had accepted.

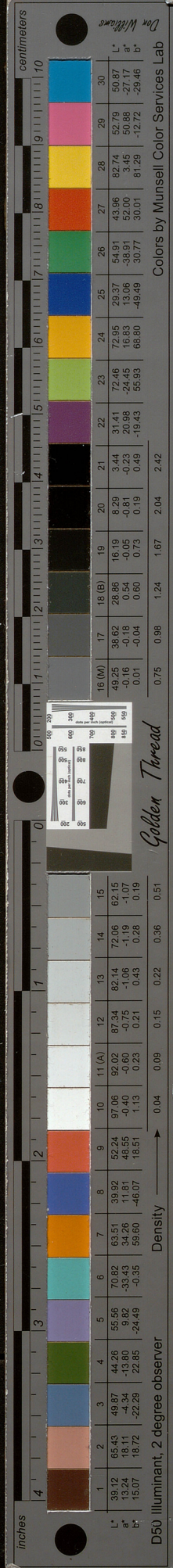
2. The Master has erred in reporting, on page 57, as untenable, the first reason assigned for respondent's demurrer.

3. The Master has erred in reporting, as untenable, the second reason, with supporting arguments, assigned for respondent's demurrer.

4. The Master has erred in reporting, on page 58, that "complainants have done what they could" so far as their doings concern the performance of their duty towards the estate of Dr. Rush.

5. The Master has erred in reporting, on page 59, that the Act of 23 Feb'y, 1870, is such an act as was contemplated by the testator.

6. The Master has erred in reporting, on page 59, that there is nothing in Dr. Rush's will, which makes inconsistent with the trust, the provisions of the Act of Assembly declaring that their (complainants) own property shall remain "under their entire and exclusive control and disposition."





7. The Master has erred in reporting, on page 61, as unsound, subdivision *g* of 2d ground of demurrer.

8. The Master has erred in reporting, on page 62, that the 3d ground of demurrer is not sustained.

9. The Master has erred in reporting, on page 63, that there is no evidence that the acceptance by the complainants of Dr. Rush's bequest has been withdrawn.

10. The Master has erred, on page 63, in reporting the contents of Complainants' Bill. There is **no** such averment, in XXIV section, page 16, as he reports, viz.: that complainants had knowledge of an alleged-to-be disqualifying promise, "at and before the twenty-ninth day of June, 1869." The time referred to in said section is the 10 December, 1870.

11. The Master has erred in reporting that the complainants are a charitable corporation.

12. The Master has erred, on page 71, in reporting that the "5th specification of demurrer cannot be supported."

13. The Master has erred, on page 74, in reporting that "if Mr. Williams should die before making the selection" of a site, the right to make such selection would not "go to the substituted Executors, Messrs Craven or Biddle, but would be executed by the Court."

14. The Master has erred, on page 76, in reporting that "the discretion which the complainants were entitled to, was "the free, voluntary, untrammelled judgment of the Executor "on the question of site, as of the day of Dr. Rush's death."

Though a will does for some purposes speak from the day of the death of the testator, no such rule is applicable to a question of an executor's discretion.

15. The Master has twice erred, metaphysically, viz.: on page 76, in conjecturing that respondent was inadequate to judge whether he had any discretion to exercise; and again, on page 82, in asserting:—



"It is impossible for any man, however cool and unimpassioned he may be, to know exactly how far his judgment would be influenced by a promise so solemnly given as that given by the respondent in this case."

16. The Master has erred in his answer, on page 83, to the self-put question: "How is the will to be carried out?" If the respondent is really disqualified, the selection must be by Alexander Biddle and Thomas Craven, and not by "a new Trustee to be appointed by the Court, nor by a decree formed after a report from a master."

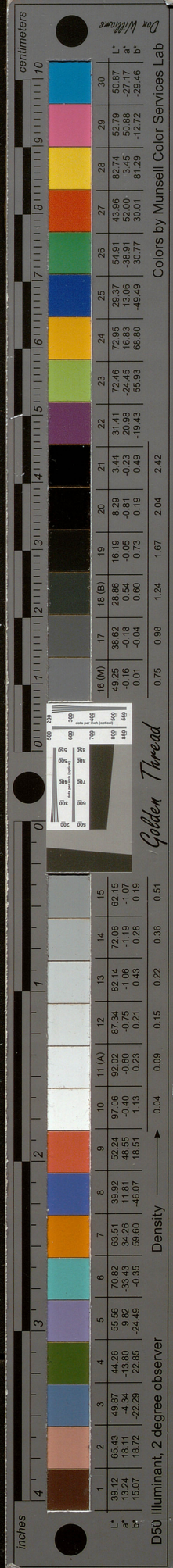
17. The Master has erred, on pages 75 and 85, in finding two facts which are irreconcilable, viz.: that the testator exacted from respondent an obligation which "did disqualify him from exercising the discretion which the testator had confided to him;" and that "the testator did nothing to disqualify the executor and trustee."

18. The Master has erred in reporting that "the trustee by his promise has so crippled his discretion, as to make it impossible to say how much his preference for the lot in question is due to his unbiased opinion that it is the most expedient for the purpose, and how much to his promise to Dr. Rush."

19. The Master has erred in reporting that the respondent's "action in the premises must be under the direction of the Court."

20. The Master has erred in reporting that complainants have any interest which "gives them a standing in a Court of Equity to ask that the selection be made under the supervision of the Court."

21. The Master has erred in reporting in favor of a reference "to a master, to inquire and report to the Court whether the proposed site is a proper and expedient location for said building, and if not, what would be such a site."





22. The Master has erred in reporting that defendant shall be restrained by "injunction from proceeding to erect the said building on the said lot, on the southeast corner of Broad and Christian Streets, until further order."

JOHN G. JOHNSON,  
GEORGE JUNKIN,  
GEORGE W. WOODWARD,  
*Solicitors for Respondent.*

